A HISTORY OF ENGLISH LAW

IN TWELVE VOLUMES

For List of Volumes and Plan of the History, see p. vii

# A HISTORY OF ENGLISH LAW

BY

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**VOLUME V**

SECOND EDITION

*To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now stands resolved, yet it is a wonderful accomplishment, and, without it, a lawyer cannot be accounted learned in the law.*

ROGER NORTH

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TO

THE RIGHT HONOURABLE FREDERICK EDWIN
EARL OF BIRKENHEAD

SOMETIME LORD HIGH CHANCELLOR OF GREAT BRITAIN

THIS WORK

IS

BY HIS LORDSHIP'S PERMISSION

RESPECTFULLY DEDICATED

# PLAN OF THE HISTORY

(VOL. I.) BOOK I.—THE JUDICIAL SYSTEM: Introduction. CHAP. I. Origins. CHAP. II. The Decline of the Old Local Courts and the Rise of the New County Courts. CHAP. III. The System of Common Law Jurisdiction. CHAP. IV. The House of Lords. CHAP. V. The Chancery. CHAP. VI. The Council. CHAP. VII. Courts of a Special Jurisdiction. CHAP. VIII. The Reconstruction of the Judicial System.

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(Vol. X.) BOOK V. (1701-1875)—The Centuries of Settlement and Reform: Introduction. Part I. Sources and General Development; Chap. I. The Eighteenth-Century Public Law.

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E



F





G



H



I



J



K



L

# LIST OF STATUTES

# ADDENDA ET CORRIGENDA

P. 5, l. 19, strike out the sentence beginning " Wotton " and substitute as follows: Nicholas Wotton (1497?–1567), who had studied law in Italy, was secretary of state, privy councillor, and, having with some difficulty escaped a bishopric, held the more congenial post of Dean of Canterbury and York.[1]

P. 5, l. 26, after the words " Dean of Durham " insert the following note: The best account of Wilson is R. H. Tawney's sketch in his Introduction to his edition of Wilson's Discourse upon Usury.

P. 22, n. 1, add: for a good account of Cowell and his Interpreter see J. D. Cowley, A Bibliography of Abridgments (S.S.) lxxxiv–lxxxviii.

P. 46, l. 13, strike out the sentence beginning " that a member " and note 5 and substitute the following sentence and notes: The position of a member of an ambassador's suite was not as yet very clearly defined by the international lawyers. On the whole they favoured the view that he shared the ambassador's immunity.[2] But the common lawyers maintained that he was amenable to the criminal law;[3] and Hale cites the case of Don Pantaleone Sa, the brother of the Portuguese ambassador, who was tried and executed for murder in 1654, to prove that this was the law.[4] But though the case was cited in the seventeenth century and later for this proposition,[5] it is not really in point because Don Pantaleone Sa, though a brother of the ambassador, was not a member of his suite. Zouche, who was one of his judges, does not cite his case as a decisive precedent.[6]

P. 54, n. 6, add: for another view of Gentili, with which I do not altogether agree see E. R. Adair, the Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries 256–7.

P. 60, l. 12, after Commercial and Maritime Law add the following note: a very good and comprehensive account of the early history of English commercial and maritime law will be found in Dr. F. R. Sanborn's book on The Origins of the Early English Maritime and Commercial Law (Am. Hist. Ass.)

[1] Dict. Nat. Biog. His great-nephew, Henry Wotton (1568–1637) was the ambassador who epigrammatically described ambassadors as follows: as in n. 3 in text.
[2] E. R. Adair, the Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries 102–6, 117–127;
Grotius said, op. cit. Bk. ii 18. 8, " si quid comites gravius deliquerint postulari a legato poterit ut eos deddat "—which implies that they would not be liable unless they were surrendered.
[3] Hale, Pleas of the Crown i 99.
[4] Ibid.
[5] For a careful examination of the case of Don Pantaleone Sa see E. R. Adair, op. cit, 147–153.

P.106, l.22, after the word " boroughs " add : from the Calendar of Early Mayor's Court Rolls of the City of London.[1]

P.107, n.9, add : for thirteenth century cases which were decided on the evidence of the plaintiff's witnesses after they had been examined see A. H. Thomas, Calendar of Early Mayor's Court Rolls 102, 118, 242.

P.109, n.4, add : in 1300 certain brokers of carts were imprisoned because they falsely told certain foreign carters that if they took their carts to London they would be seized, and then, having hired the carts from them for one mark, they let them out again for two marks, Calendar of Early Mayor's Court Rolls 72.

P.109, n.7, add : for a case decided in London in 1300 in accordance with the law merchant see Calendar of Early Mayor's Court Rolls 101.

P.110, n.2, add : see also Calendar of Early Mayor's Court Rolls 68, 262–3.

P.111, l.7, after the word " cases " add : The plaintiff wants an account from the defendant of goods which he has given the defendant to trade with for their common profit.[2]

P.111, l.5 from bottom, after the word " expenses " add : In 1300 there is a case in the Mayor's Court of the City of London in which a plaintiff claimed to be indemnified for an injury to his horse suffered by him while acting in pursuance of his employer's orders.[3]

P.114, l.13 from bottom, after the words " usury laws " add : and on the calendar of the rolls of the Mayor's court of the City of London there are cases of 1300 and 1305 which turn upon dealings with bills of exchange.[4]

P.123, n.10, add : for cases which involved the application of some of these rules of maritime law in the City of London see Calendar of Early Mayor's Court Rolls 123, 168, 192–3, 223, 243–5.

P.143, last line, after the words " turning on " add : or referring to.

P.144, n.8, add : as to this case (Southern v. How) see F. I. Schechter, Historical Foundations of Trade Mark Law 6–10, 123–4 : Mr. Schechter has shown that the dictum of Dodderidge, J. on the subject of merchants marks is not contained in some of the reports of this case, that those which do report it give different versions of it, and that it was not till the eighteenth century that it was cited and used as an authority ; but he has shown that in a series of cases, from the case of Blanchard v. Hill (1742) 2 Atk, at p. 485 to Magnolia Metal v. Tandem Smelting Syndicate (1900) 17 Rep. Pat. Cas. at p. 483, it has been relied on " to establish the antiquity of the jurisdiction of the common law courts to prevent trade mark piracy." In fact this inconclusive and variously reported dictum has been used to make modern law, just as many similar dicta in the Y.BB. were used by Coke and later writers and judges.

[1] Edited by R. H. Thomas.
[2] Calendar of Early Mayor's Court Rolls 104, 132–3.
[3] Calendar of Early Mayor's Rolls 88–89.
[4] Calendar of Early Mayor's Court Rolls 94, 172, 200–201.



P.157, n.3, add : Evidence is accumulating that the county court kept records of its business (Camb. Hist. Journal i 103 ; Harv. Law Rev. xlii (640–3) ; but the fact that it kept these records does not give the court the status of a court of record, because the statements contained in them could be and were disputed. The exact status of these records of the county has been a matter of dispute between Professors Plucknett and Woodbine, see Harv. Law Rev. xlii 639, xliii 1083, 1111 ; the whole question has recently been examined and summed up with great learning by Professor Lapsley in L.Q.R. li 299-325. He concludes that these county records and rolls were evidence of what took place in the county court, and were so treated by the King's judges—but they were not incontrovertible evidence. " We may," he says, "accept Professor Woodbine's conclusion that we can continue to be certain that the comitatus was not a court of record. We can be all but certain that the comitatus kept no written record, and we shall still be free to admit without self contradiction that we have in these rolls a written record of the comitatus," L.Q.R. li at pp. 324–5.

P.159, l.12, after the word " England " add the following paragraph : Another distinction drawn by Coke between courts of record and courts not of record was as to the effect of a judgment in these two varieties of courts. He said that the proceedings in the latter variety " could be denied and tried by a jury",[1] but that the proceedings in the former variety could not. No great importance was attached to this distinction in the seventeenth century. But it came to be of some importance in the eighteenth and nineteenth centuries. We shall see that during those centuries the question of the effect which the English courts would give to foreign or colonial judgments was discussed in several cases.[2] On this matter there was little or no authority. But it was clear that these foreign and at least some of the colonial courts were not courts of record. Coke's words were remembered and given a new emphasis. It was said that the judgments of these courts, like the judgments of courts not of record, created no merger of the cause of action, and could be enforced, not by writs of execution, but by bringing an an action on the judgment.[3]

P.159, n.3, add : for a learned discussion of this question see J. E. Thorne. *Courts of Record and Sir Edward Coke* Toronto Law Journal ii 35–47 ; Prof. Thorne's conclusion is that Coke's view that a court of record must be able to fine and imprison " is completely without authority " ; but it was accepted by later lawyers as good law, see Groenvelt *v.* Burwell (1700) 1 Ld. Raym, at pp. 467–8.

P.159, n.7, add : Prof. Thorne, Toronto Law Journal ii, 48–9 thinks that Coke wished not only to cripple the Chancery and the conciliar courts, but also to strengthen the position of the two Houses of Parliament, by ascribing to them the powers of courts of record—hence his insistence on the power to fine and imprison as their most characteristic feature, and his neglect of the possession of a formal Latin plea roll ; this

[1] Co. Litt. 117b.
[2] Vol. xi. 271–2.
[3] Walker v. Witter (1778) 1 Doug. at p. 6 ; Smith v. Nicholls (1839) 5 Bing N.C. at pp. 220–221.

may be so, but I think the first object was Coke's main object—no one had seriously contested the powers of the Houses to fine and imprison.

P.163, l.19, for Leadam read Baildon.

P.166, n.3, add : but Professor Pollard, History xi 251, proves that this suggestion of Miss Schofield cannot be correct.

P.198, l.8, after the words " offences stated " delete the rest of the sentence and substitute as follows : by Marowe,[1] Brooke[2] Hudson[3] and Coke ;[4] and it is reasonably clear that the three last named authorities followed the definitions given by Marowe in his Reading *De Pace*. Thus the view taken by the Star Chamber and by the common law courts were in substantial agreement because they both relied on the authority of Marowe.

P.198, l.19, after the words " too wide " add the following note : In the case of his definition of unlawful assembly he may have been misled by Brooke who does not say that the act must be an act of violent wrong doing : it may also be noted that this aspect of these three offences is not clearly brought out by Marowe.

P.201, l.9, from bottom, add : But it was nearly a century and a half before the common law stated the principle that an attempt to commit a crime was a crime as clearly as it had been stated by the Court of Star Chamber.[5] This was due to two main causes. First, the judges thought it necessary to reconcile the now accepted rule that a mere intent to commit a crime was not a crime,[6] with the new idea that at empts to commit crimes ought to be regarded as crimes. In 1660[7] and 1696[8] defendants who had not only shown an intent to commit a crime, but who had done an act in pursuance of that intent were punished ; and Hawkins in 1716 seems to have come to the erroneous conclusion that a person could be fined for a mere intention to commit a felony.[9] But in 1730 the court ruled that a bare intention was not punishable, " and yet when joined with acts whose circumstances may be tried it is so—as loading wool with intention to transport it."[10] Secondly, the court held that attempts to do certain kinds of acts were in themselves crimes. In 1678 it was held that an attempt to get another to commit perjury amounted to the crime of attempting to subvert justice ;[11] and in 1769 that an attempt to bribe a servant of the Crown was a substantive offence.[12] It was not until 1784 that the court laid it down that

[1] Putnam, Early Treatises on the Justice of the Peace 339.
[2] Bro. Ab. *Riottes et Routes et Assemblies* pl. 5, citing Marowe's Reading.
[3] Hudson, op. cit. 82. [4] Third Instit. c. 79.
[5] F. B. Sayer, Criminal attempts, Harv. Law Rev. xli, 829–35; I have taken the cases cited from this article.
[6] Vol. iii, 373.
[7] Bacon's Case 1 Lev. 146.
[8] 5 Mod. 206.
[9] Pleas of the Crown (1st ed.) Bk. I c. 25 § 3.
[10] R. v. Sutton, Cases t. Hard, 370.
[11] R. v. Johnson, 2 Shower 1.
[12] R. v. Vaughan, 4 Burr. 2494



the completion of an act criminal in itself is not necessary to constitute criminality.[1] That decision put on its modern basis the modern law concerning criminal attempts.[2] But as late as 1833 counsel argued unsuccessfully that an attempt to commit a common law misdemeanour, and as late as 1837 that an attempt to commit a statutory misdemeanour, was no offence.[3]

P.203, n.9, add : but it is clear from Marowe *De Pace* (Putman, op. cit. 372–3) that Marowe was prepared to generalize from the few cases in which it had been held that a conspiracy to do any unlawful act was an offence (vol. iii 406 n. 4), and to lay it down that all conspiracies to do unlawful acts were crimes.

P.205, l.2, after the words " legal proceedings " delete the words " the Star Chamber acted upon this view," and substitute : This view had, as we have seen, been taken by Marowe, and it was acted upon by the Star Chamber.

P.205, n.2, delete the words " Coke had some little authority for this view," and substitute : Marowe's Reading shows that Coke had some authority for this view.

P.251, delete ll. 2–8 and substitute as follows : A collection of Bacon's decisions as chancellor, taken from the records of the court, has been published by Mr. John Ritchie.[4] These, together with some scrappy and unsatisfactory notes in Tothill,[5] are the only authorities for the work done by Bacon as chancellor. Mr. Ritchie's collection illustrates the need for a court with an equitable jurisdiction, which, by the issue of a common injunction could stop unrighteous proceedings in the courts of common law.[6] It illustrates also the fact that equity very closely followed the law,[7] and that it still acted very literally *in personam*—in one case Bacon modified his decree because *inter alia* the defendant was a " widow charged with eight children."[8] At the same time some of these decisions show that the court was beginning to rely upon precedents,[9] and ; consequently, that some definite principles and some distinct bodies of equitable doctrine were emerging. The fact that trusts charitable and private, questions connected with the administration of assets, the separate property of married woman, mortgages, relief against fraud oppression and mistake, suits for discovery and the perpetuation of testimony,[10] are the subjects of a large number of these cases, show that the sphere which equity will occupy in the English legal system is becoming fixed. But these decisions, because they are embodied in records, have the impersonal touch which characterizes all records. With Bacon, as with the other chancellors

[1] R. v. Scofield, Cald, 397 at p. 400.
[2] Harv. Law Rev. xli ; 835.
[3] Camb. Law Journal vi 196, citing R. v. Harris 1 C. & P. 129 ; R. v. Roderick 7 C. & P. 795.
[4] Reports of Cases decided by Francis Bacon, prepared from the records of the Court (1932) ; for an account of this book see an article by myself in L.Q.R. xlix 61–69.
[5] For Tothill's book seen below 276, 277.
[6] L.Q.R. xlix 62–3. [7] Ibid. 63–4.
[8] Horne v. Derbyshire (1618–19) Ritchie, op. cit., 190.
[9] Ibid. at p. 133. [10] See L.Q.R. xlix 65–67.

P.372, l.12, from bottom, after the words " decided cases," add the following note : Professor Lambert in his book on the Year Books at pp. 75–6 says : " Si ce dépouillement superficiel du contenu des Year Books ne permet pas d'affirmer qu'ils sont la cause du développement du *case law* ou *judgemade-law* vers ses formes spécifiquement anglaises, il prouve au moins de façon évidente qu'il y a entre la publication des Year Books et ce développement une étroite connexion . . . Il est, en tout cas, au moins curieux de constater que le seul pays qui possède des Year Books est aussi le seul a avoir attaché au précedent cette autorité démesurée et a avoir développé un rigide système de *case law* "

P.373, l.5 from bottom, for the words " reports of Burrow " substitute the words Term Reports of Durnford and East.

P.376, l.4 from bottom, after the words " case law " delete the rest of the line and substitute as follows : Brooke, it is true had cited the Old Natura Brevium, Fitzherbert's Nature Brevium, the Old Tenures, Doctor and Student, Marowe's Reading *De Pace* and a few statutes.[1] But Rolle made a new departure by including summaries both of

P.380, n.2, add : There is perhaps a slight doubt whether this edition existed : in that case the 1537 edition is the first, Putnam, Early Treatises on the Justices of the Peace 34 and n. 4.

P.380, n. 6, add : for a full account of this episode see J. B. Williamson, The History of the Temple 340–44 : one result of this interference was that Bagshaw was elected in the following year a member of the Long Parliament for Southwark, " without (he says) his asking or seeking, or stepping one foot out of his chambers in the Temple to that intent."

P.393, l.3, from bottom, after the word " authors " add : The only Reading in print which has been adequately edited is Miss Putman's elaborate edition of Marowe's Reading *De Pace*.[2] This and earlier volumes of this History show how valuable the information given by this Reading is on many points of medieval law.

P. 394, l.2. from bottom after the words " Magna Carta " add : in 1647 Robert Callis's Reading on Henry VIII's statute of sewers[3] which he gave at Grays Inn in 1622 ;[4]

P.398, n.3, add : for a good account of these maxims and their influence on the development of English law see Professor Hazeltine's Introd. to Ogg's Ed. of Selden's Dissertatio ad Fletam xlii–xlvi.

[1] Winfield, Chief Sources of English Legal History 233. In the Addenda and Corrigenda to vol. ii I have erroneously said that this matter was included in Fitzherbert's Abridgment.
[2] Putnan, Early Treatises on the Justices of the Peace 286–414.
[3] 23 Henry VIII c. 5.
[4] It was the most widely read of all these Readings, reaching a fourth Ed. in 1824.



P.401, l.6 from bottom, after the words " in 1527," delete the rest of the page and substitute as follows : It was the first law dictionary to appear in England " and probably had as long a life as any English law book, passing through at least twenty-nine editions, the last of which appeared (in America) in 1829."[1] It has been supposed that its author was William Rastell, the judge of Mary's reign. But Mr. Cowley has shown that this conjecture is without foundation, and that John was its author.[2] The edition of 1530 and all subsequent editions were accompanied by a translation, " and in later years the *Termes de la ley*, as the book came to be called, became an Anglo-Norman reader for law students."[3] The later editions were enlarged ;[4] but though new editions appeared till the beginning of the nineteenth century, it was superseded by similar works of a more elaborate kind. I have already dealt with the

P.402, n.2, add : see J. D. Cowley, A Bibliography of Abridgments (S.S.) lxxxviii.

P.443, n.4, add : confirmation of this suspicion is afforded by what was said in the House of Commons in 1621, Notestein, Commons' Debates 1621 vi 210–12, 213, 423 ; it was said that Lepton and Gouldsmyth, two patentees who had been attacked by the House, conspired to exhibit a bill against Coke in the Star Chamber, and that Lady Hatton was privy to the conspiracy.

P.474, n.2, add : Mr. Bolland has convicted Coke of an error in correcting a statement made by Littleton through reliance, not on the MS. Year Books, but on Fitzherbert's Abridgment—thus showing that the moral which he drew from this correction, that the record should always be read, was neglected by him, Bolland, A Manual of Year Book Studies 85–6 citing Co. Litt. 293 b.

P.490, n.4, add : Sir F. Pollock has edited for the Selden Soc. a new edition of the Table Talk from a hitherto uncollated MS. in Lincoln's Inn Library ; in the Introduction he gives us an appreciation of the Table Talk, and an account of the printed editions.

P.493, delete the last three lines and substitute as follows : This is a large claim ; but not I think too large Intellectually Coke was a statesman of the Tudor period ; and his work has all the characteristics of Tudor statesmanship. In fact it was its complement ; for just as the Tudor statesman succeeded in adapting the medieval institutions of the English state to modern needs, without any appreciable sacrifice of the medieval ideas contained in them, so Coke succeeded in remoulding the medieval common law in such a way that it was made fit to bear rule in the modern English state. As a lawyer and a statesman he belonged to the greatest period of the Tudor dynasty—the Elizabethan age ; and so, like many of the other great leaders of thought and action in that age, he was the author of much in our national life that we still rightly treasure. What Shakespeare has been to literature, what Bacon has been to philosophy, what the translators of the Authorised Version of the Bible have been to religion,

[1] J. D. Cowley, A Bibliography of Abridgments (S.S.) lxxxi.
[2] Ibid. lxxxii. [3] Ibid.
[4] Ibid. lxxxiii–iv.

Coke has been to the public and private law of England. He was one of those great Elizabethans whose genius and enthusiasm enabled them, as Kipling so finely and truly said,

*Lightly to build new world, or lightly loose*
*Words that shall shake and shape all after-time.*

But it was Coke's work upon our constitutional law which was the most fundamentally important of all his many services to English Law, for without it none of his other services could have taken effect. Of this work I shall speak at some length in the following chapter.

Pp.497–499, add : to the list of Readings in App. II the following list taken from Miss Putnam's Early Treatises on the Justices of the Peace pp. 178–181 :
21 Ed. IV 1481, Richard Hall, Statute of Gloucester, c. 1.
22 Ed. IV 1482, Morgan Kidwelly, Magna Carta c. 11.
3 Rich, III and 1 Hy VII 1485 (?), Thomas Frowick, Westminster II cc. 1–50.
1 Hy. VII 1486 (?), Thomas Keble, Westminster I c. 1.
10 Hy. VII 1495 (?), Humphrey (?) Coningsby, Statute of Merton c. 1.
16, 17 Hy. VII 1501, Thomas Pygott, Statute de Quo Warranto.
17 Hy. VII 1502, Grevell, Statute of Gloucester, c. 1.
19 Hy. VII 1504, William Rudhale, Westminster II, c. 24.

# BOOK IV (*Continued*)

## (1485–1700)

## THE COMMON LAW AND ITS RIVALS

# A HISTORY OF ENGLISH LAW

## PART I

## SOURCES AND GENERAL DEVELOPMENT (*Continued*)

### CHAPTER III

### ENGLISH LAW IN THE SIXTEENTH AND EARLY SEVENTEENTH CENTURIES (*Continued*)

#### Developments Outside the Sphere of the Common Law

WE have seen that the large changes which took place during this period on all sides of the national life caused important developments in the composition and jurisdiction of the courts and councils which administered branches of law outside the sphere of the common law. The work of the Council and the Star Chamber, the court of Admiralty, and the court of Chancery, was increased and therefore specialized;[1] and the amount of work to be done made it necessary to create subordinate branches of the Council in Wales and the North,[2] and a court of Requests to assist the court of Chancery.[3] All these courts contributed their quota to the development of various parts of English law. Sometimes they merely helped towards a better administration of common law rules; but more often they created rules of law which either anticipated and inspired later developments of the common law, or introduced new ideas, sometimes wholly opposed to established common law doctrines, into the English legal system. It is with these new developments and new ideas that I shall deal in this and the following chapter.

We have seen that certain of these new developments and new ideas were strongly influenced by the civil law, as administered in continental states.[4] On the other hand, neither the Council nor the Chancery administered purely civil or purely common law rules. Rather, they administered a criminal and

[1] Vol. i 409-411, 497-502, 546-547, 549-556.
[2] Ibid 502-503. [3] Ibid 412-416. [4] Vol. iv 238, 272-283, 285-287.

# A HISTORY OF ENGLISH LAW

## PART I

## SOURCES AND GENERAL DEVELOPMENT (*Continued*)

### CHAPTER III

### ENGLISH LAW IN THE SIXTEENTH AND EARLY SEVENTEENTH CENTURIES (*Continued*)

#### Developments Outside the Sphere of the Common Law

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[2] Ibid 502-503. [3] Ibid 412-416. [4] Vol. iv 238, 272-283, 285-287.

civil equity[1] peculiar to themselves. It follows therefore that the subject falls naturally into three parts :—

(1) Developments directly influenced by the reception of rules and ideas of the civil law.

(2) The law administered by the Council and Star Chamber.

(3) The equity administered by the Chancellor.

With the first of these parts I shall deal in this chapter, and with the second and third in the next.

We have seen that in the last half of the sixteenth century the civilians had become an organized body, and that the spheres of their activity were becoming settled.[2] Some of these civilians, either by their professional or their literary work, did much to shape the development of the law. Therefore, by way of introduction to my account of this development, I shall say something of the lives and works of the most notable of these men.[3] I shall then describe the two most important branches of the law developed by these civilians—international law, and commercial and maritime law.

## I

## The Civilians and Their Activities

In the first place, I must notice a series of administrators, lawyers, and judges; and, in the second place, a number of writers on the various branches of law which fell within the sphere of the civilians' practice, on the theory of the law, on the relation of the civil law to the common law, and on the history of the civil law.

(1) *The administrators, lawyers, and judges.*

During the whole of this period many of the civilians played a great part in public life in many different spheres.

In the earlier part of the period the old school of civil servants, who, being in orders, could be rewarded from the revenues of the church,[4] was still predominant. One of them was Cuthbert Tunstall, doctor of Laws of Padua, and a member

[1] "And as the Chancery had the pretorian power for equity, so the Star Chamber had the censorian power for offences under the degree of capital," Bacon, History of the Reign of Henry VII.; "the Starre chamber, the schoole of Englande to punishe all fraude and practices, as the Chancery doth all rigor and extremetie, the one a bridle, th'other a spurre," Hawarde, Les Reportes etc. 174.

[2] Vol. iv 235-238.

[3] Except where otherwise stated I have relied on the statements in the Dictionary of National Biography, and on Mr. Leadam's notes upon the lists of judges in the court of Requests, Select Cases in the Court of Requests (S.S.) cx-cxxiv.

[4] Vol. i 587; vol. ii 226-230, 318-319.



of that literary circle which adorned Henry VIII.'s court in the earlier years of his reign.[1] He served the king as ambassador, Keeper of the Privy Seal, and President of the Council of the North; and held successively the sees of London and Durham. Rowland Lee, bishop of Coventry and Lichfield, was another civil servant of a similar type. He took his degree in Laws at Cambridge, and did good service as President of the Council of Wales. Stephen Gardiner, likewise, was a Cambridge doctor of civil and canon law, an ambassador, Lord Chancellor, and bishop of Winchester. Bonner, an Oxford D.C.L., served Henry VIII. as ambassador, before he was promoted to the sees first of Hereford, and then of London; and before he earned the reputation, which Fox has indelibly fastened upon him, of being one of the most active agents in the Marian persecutions. Layton, a Cambridge LL.D., who became Dean of York, took a leading part in the enquiries which led to the dissolution of the monasteries. In Elizabeth's reign these administrative and diplomatic posts were still held by civilians in orders. The famous Sir Thomas Smith[2] was Dean of Carlisle. Wotton, who had studied the law in Italy, who was secretary of state, privy councillor, and an ambassador who epigrammatically described ambassadors,[3] with some difficulty escaped a bishopric, and held the more congenial posts of Dean of Canterbury and York. Thomas Wilson, D.C.L. of the University of Ferrara, master of Requests, ambassador, secretary of state, and privy councillor, was Dean of Durham.

About the middle of the sixteenth century a race of lay civilians was arising, who did the work of their ecclesiastical predecessors. As ambassadors, as international lawyers, as judges of the court of Admiralty, as bishops' chancellors and judges in the ecclesiastical courts, as masters of Requests and masters in Chancery, sometimes as judges advocate to the military forces—they filled a large administrative sphere. Some of them were foreigners, others, who were Englishmen, had been trained in civil law at a foreign university.[4] But, at the latter part of this period, they were mainly Englishmen, who had learned their civil law at Oxford or Cambridge, and had become members of Doctors' Commons. To give a detailed list of these men would be both tedious and useless. I shall only mention briefly a few names famous in the different spheres of their activity.

In the sphere of international law and diplomacy one of the

[1] Vol. iv 29-30, 41. [2] See vol. iv 209-210 for some account of his career.

[3] "Legatus est vir bonus peregre missus ad mentiendum reipublicæ causa"—an epigram which called forth an attack by Scioppus; but it had in it a substantial element of truth, see Nys, Les Origines du Droit International 335.

[4] See Maitland, English Law and the Renaissance 62-63 n. 33.

earliest of these lay civilians was Carne, an Oxford D.C.L., who was acting as ambassador at Rome at Elizabeth's succession, and prudently contrived that the pope should decline to allow him to return. Perhaps the most notable figure in the latter part of the sixteenth and earlier part of the seventeenth century is Dr. Julius Cæsar.[1] He was the son of the naturalized Italian physician, Cæsare Adelmare, who had both Elizabeth and Mary among his patients. He held the positions of judge of the Admiralty, master in Chancery, master of Requests, chancellor of the exchequer, privy councillor and member of the Court of Star Chamber,[2] master of the rolls, bencher and treasurer of the Inner Temple, and member of Parliament. The industry with which he applied himself to the duties of these various positions is proved by the 187 volumes of papers on different subjects which he compiled. Mr. Marsden says[3] that, "the care with which they have been arranged and indexed with his own hand shows that he was a man of great industry and methodical habits, whilst the importance and variety of their contents indicate that for nearly half a century his advice was sought and relied upon by the Government in matters of foreign policy." Among the most interesting of these papers are his defence of the legal position of the court of Requests,[4] and his papers on international questions.[5] There is another paper "Concerning the Private Council of the most high and mighty King of Great Britain, France, Scotland and Ireland,"[6] containing brief observations on the component parts of the Privy Council and the officers thereof, which has not yet been published. Two other civilians, who were regularly consulted by the government, were Dr. Valentine Dale and Dr. Aubrey.[7] Dale was a D.C.L. of Orleans and Oxford and LL.D. of Cambridge, an advocate of Doctors' Commons, ambassador, member of Parliament, member of the Court of High Commission, and, with Cæsar, commissioner to execute the post of Lord High Admiral during the vacancy of that post in 1584-1585. Aubrey was a fellow of All Souls, professor of civil law and D.C.L. of Oxford

[1] See Leadam's Introd. to Select Cases in the Court of Requests (S.S.) xxii-xlvi; Marsden, Select Pleas of the Admiralty (S.S.) ii, xii; Foss, Lives of the Judges vi 266-272; see ibid vi 102-104, and 272-277 for the lives of his father and son.

[2] Hawarde, Les Reportes etc. 327 notes that he took his seat in the Star Chamber for the first time on October 14, 1607.

[3] Op. cit. xii.

[4] Summarized in Select Cases in the Court of Requests (S.S.) xxii-xxxii.

[5] Nys, Les Manuscrits de Sir Julius Cæsar, Rev. de Droit International xix 461; Le droit Romain, le droit des Gens etc. 82, 83.

[6] S.P. Dom. 1625-1626, 138, viii 77.

[7] Nys, Les Origines du Droit International 354-356; Le droit Romain, le droit des Gens etc. 56, 57; Monro, Acta Cancellaria 11 n.



University, judge advocate for the army in the campaign against St. Quentin, vicar-general to Grindal, chancellor to Whitgift, a member of the Council of Wales, a master in Chancery, and a master of Requests. Both Dale and Aubrey, with other civilians, were consulted by the government in 1571 as to the case of the bishop of Ross, the ambassador of Mary Queen of Scots, who had been concerned in the plots against Elizabeth's life.[1]

In the sphere of maritime and commercial law there are a succession of judges of the court of Admiralty, whose work is buried in the records of the court.[2] Dr. Lewes, fellow of All Souls, first principal of Jesus College, master in Chancery and master of Requests, and member of Parliament, held the post for twenty-five years. He was succeeded by Julius Cæsar, who held the post during the remainder of Elizabeth's reign. Another distinguished civilian, who held that post and many others in the early part of the seventeenth century, was Sir Henry Marten. In the course of his career he was sent on an embassy to the Palatinate, acted on a commission to compose the differences between the English and Dutch East India Companies, and helped in the Laudian codification of the statutes of Oxford University. Besides being judge of the Admiralty he was also Dean of the Arches, and judge of the Prærogative court—as James I. once told him he was "A mighty monarch in his jurisdiction over land and sea, the living and the dead." What was perhaps more unusual in a civilian, he took a prominent part in the Parliament of 1628, as an advocate of moderate measures. He resisted the Lords' amendments to the Petition of Right, but he voted against the proposal to censure the Duke of Buckingham by name.[3]

In the sphere of ecclesiastical law a notable name is that of Haddon, regius professor of civil law at Cambridge, one of that brilliant company of Cambridge humanists,[4] and principally responsible for drawing up the abortive Reformatio Legum Ecclesiasticarum.[5] He also held the posts of judge of the Prærogative court, and master of Requests, and was employed upon a negotiation at Bruges in reference to commercial matters. Sir Thomas Crompton, the chancellor to the bishop of London, vicar-general to the Archbishop of Canterbury, and judge of the Admiralty,[6] was given a transient notoriety by reason of the attack

[1] Below 45.

[2] Select Pleas of the Admiralty (S.S.) i, lix, lx; ibid ii, xi, xii.

[3] Gardiner, History of England vi 282-283; see ibid vii 310-311 for his resentment at the action of Charles I. in 1633 in removing a case pending before him as Dean of the Arches as to the position of the communion table.

[4] Vol. iv 43

[5] Vol. i 592, 594; cp. Pollock, Essays in the Law 280.

[6] Coote, Lives of the English Civilians 69.

made on him by Coke and his vindication by James I.,[1] on the famous occasion in 1608 when Coke maintained the supremacy of the common law.[2] Another ecclesiastical lawyer, distinguished as a controversialist, was Dr. Cosin, an LL.D. of Cambridge, advocate of Doctors' Commons, Dean of the Arches, and vicar-general.

Of those who held the positions of judge advocate general the best known is perhaps the Dutchman Dorislaus. He was judge advocate to Charles I. in 1640; and to Essex, the commander of the Parliamentary forces, in 1642. He took some part in the trial of Charles I., and thereby earned the hatred of all royalists. Having been sent as envoy to the United Provinces, some Scotch royalists attacked him in his inn and murdered him.[3] Arthur Duck also, besides acting as chancellor in two dioceses and as master in Chancery, was king's advocate in the Earl Marshal's court. As we shall see, his fame rests chiefly on his literary work.[4]

Very many of these civilians, and others besides, acted at some period of their career as masters of Requests and masters in Chancery;[5] and through them the civil law may have had some influence, if not upon the law administered, at any rate upon the development of the forms of the procedure used in those courts.[6] All of them, in their different capacities, helped to define and settle the sphere occupied by the civil law, and the form and application of its rules. We shall now see that their efforts were assisted by the books which were written during this period on most of the departments of the civilians' practice, on the theory of the law, on the relation of the civil law to the common law, and on the history of the civil law.

(2) *The literature of the civil law.*

The department of law on which there was the most abundant literature was the new international law. Nys tells us that, in the last years of the sixteenth century, the books of Englishmen took a leading part in the development of the law.[7] Of the works of the two most important writers, Gentili and Zouche, I shall

[1] James told Coke that Crompton was as good a man as he was, "Coke having by way of exception used some speech against Thomas Crompton," Letter from John Hercy to the Earl of Shrewsbury cited E.H.R. xviii 669; see Senior, Doctors' Commons and the Old Court of Admiralty 89.

[2] Below 430-431.

[3] Ranke, History of England iii 37-38.

[4] Below 24-25.

[5] That a large number of the masters in Chancery were at this period civilians is clear from the lists of the masters given by Foss in vols. v and vi of his Lives of the Judges; for an account of some of them see below 257-261.

[6] Vol. ii 228 n. 5; below 258.

[7] "A partir de Gentil, notre science se développe en Angleterre," Nys, Les Origines du Droit International 133.



speak at length when I come to deal with the history of international law in this country.[1] Here I shall only notice briefly a few of the less important books on this subject.

In 1589 and 1591 appeared two translations of a book entitled *Instructions sur le faict de la guerre* by Raymond de Beccaria of Pavia. The first translation was made by Paul Ive and was called *Instructions for the Warres.* The second was made by John Eliot from a French translation of the original, and was called *Discourse of Law and Single Combat.*[2] In 1593 Matthew Sutcliffe produced an original book on the same subject entitled *The Practice, Proceedings and Lawes of Armes.*[3] This Sutcliffe was a Cambridge LL.D. and one of the clerical civilians. He was a theologian who had conducted controversies with Bellarmin Parsons and Garnet, Dean of Exeter, the founder and principal of the short-lived theological college of Chelsea to which James I. was a liberal patron, and a member of Doctors' Commons. The book does not, like some of the older works on this subject, enter at length into a proof of the legitimacy of war; but it deals at length with its justifiable causes. It must be waged by the authority of the sovereign, and without unnecessary cruelty. He deals with the treatment of prisoners, the qualities of a general, the recruiting, pay, and discipline of the troops. Fulbecke, a member of Gray's Inn, who wrote a masque, a history, and a volume on Christian ethics, besides some law books of a discursive and original type,[4] devoted some chapters of a brief and rambling work, entitled *The Pandectes of the Law of Nations,*[5] to the consideration of certain points connected with the laws of war, leagues, embassies, and the unrighteousness of war against infidels. Richard Bernard, a puritan divine, discussed some points connected with the same subject in a book entitled *Bible Battels or the Sacred Art Military.*[6]

All these books are concerned chiefly with the law of war. It was, as we shall see,[7] the oldest part of international law, and

[1] Below 52-55, 58-60.

[2] Nys, op. cit. 133-134.

[3] Ibid 134-136; it was dedicated to Essex; see also Dict. Nat. Biog.; Raleigh also published *A Discourse of the Original and Fundamental Cause of Natural, Customary, Voluntary and Necessary War;* but as Nys says, ibid 136, "Il ne contient rien de fort intéressant comme doctrine."

[4] Below 22-24.

[5] The full title is "The Pandectes of the law of nations: contayning severall discourses of the questions, points, and matters of law, wherein the nations of the world doe consent and accord"; it was published in 1602; the chapters in which questions of international law are touched on are vii—of the law and justice of arms, of leagues and embassages, and denouncing of warre, of truce, of safe-conduct, captives, hostages, stratagems, and conquests according to the law of nations; xii—that the rules of warre and the law of nations are not to be observed and kept with Pyrates, Rebels, Robbers, Traytors, Revoltes, and Usurpers; xiii—that by the law and practice of Nations, warre is not to be maintained against Infidels onely because they are Infidels.

[6] Journal Soc. Comp. Leg. ix 297: the book was published in 1629.

[7] Below 28-29.

therefore the part upon which authority was most abundant. It was the topic on which Gentili wrote his most important book.[1] There were, however, one or two books published on other parts of the subject. Gentili wrote on Embassies;[2] and in 1587 a tract (inspired probably by the case of Mendoza) appeared at Oxford entitled *De Legato et absoluto principe perduellionis reo.*[3] Zouche, too, as we shall see, has much to say on all questions both of peace and war.[4] But, with these exceptions, the only other class of literature on this subject are three books which deal with the English claim to the sovereignty over the four British seas. Two of these books are works of minor importance. One, published in 1615, is by Welwod, a Scotchman who professed successively mathematics and civil law at St. Andrews. It is entitled *De dominio maris juribusque ad dominium præcipue spectantibus assertio brevis ac methodica.*[5] The other is by Sir John Borough or Burroughs, Garter king of Arms, and keeper of the records in Charles I.'s reign. It is entitled *The Sovereignty of the British Seas proved by records, history and the municipal laws of this kingdom;* and in it the English contention, and the authorities on which it was based, are shortly summarized. It was published in 1653, ten years after the author's death.[6] The third is the great work of Selden on the *Mare Clausum.*

Selden was, in the first place, a common lawyer; and I shall speak of him and his work as a common lawyer at some length in a later chapter.[7] We shall see that he was one of the first of the common lawyers to deal effectively with the history of the common law; and that he owed part of his effectiveness as a legal historian to the fact he was critically acquainted with the sources of English history, and a master of many other kinds of learning besides that of the common law. In the *Mare Clausum* he showed that he was a competent international lawyer. The book was composed in 1618. It was called forth by the appointment of a commission to settle disputes which had arisen in consequence of the claim of the Dutch fishers to fish in English waters without the king's licence;[8] and it was intended as an answer to Grotius's *Mare Liberum.* In 1618 James I. had declined to authorize its publication for fear of offending the king of Denmark. But in 1635 it was published at the request of

[1] Below 53-55. [2] Below 52, 53.
[3] Nys, Les Origines du Droit International 356; Professor Holland has suggested that it is a dissertation written by one of the recipients of the degree of doctor in 1587, ibid.
[4] Below 58-60; for his life see below 17-18.
[5] Nys, op. cit. 385.
[6] Ibid 385; it is printed in the 1686 edition of Malynes, Lex Mercatoria.
[7] Below 407-412. [8] Below 47.



Charles I. and dedicated to him.[1] Charles was so pleased with it that he directed that official copies should be kept in the Privy Council Office, the Exchequer, and the Admiralty.

The book shows that Selden never wholly lost the characteristics of the common lawyer. It is not, like Grotius's work, based on large philosophical principles. But it exhibits a vast historical knowledge, and it is fortified at every point with authority from record, statute, book-case, and chronicle. But, as Sir E. Fry has pointed out,[2] his case was so bad that his learning was wasted. "The first book argues that by the law of nature or nations the sea is not common to all men, but is, as much as the land, the subject of private property. In the second book he maintains that the lordship of the circumambient ocean belongs to the crown of Great Britain as an indivisible and perpetual appendage. This claim has long since been abandoned." But for the time, Selden triumphed. The States General did not dare to publish the reply of Graswinckel; and when, in 1652, that reply was published, in answer to a claim put forward by the Genoese to the sovereignty of the Ligurian sea, he made the mistake of alleging that Selden's motive in writing his book was to procure his liberation from prison by pleasing the king.[3] As Nys has said, the case of Grotius, though better than that of Selden, was contrary to the economic ideas of the day. "The maxim *Cujus regio ejus commercium* governed commercial policy, just as the maxim *Cujus regio ejus religio* governed religious policy."[4]

On maritime and commercial law very few books were written by the civilians. Welwod, professor of the civil law in the University of St. Andrews, published in 1590 the *Sea Law of Scotland;* and from this book, which he calls, "a weake piece of labour," grew his "Abridgement of all Sea Lawes,"—a clear and useful summary of maritime law.[5] It was published in 1613; and from it Malynes borrowed largely without acknowledgement. There is a little information about Admiralty jurisdiction in Ridley's *View of the Civile and Ecclesiasticall*

[1] Republished in 1636 in London, Leyden, and Amsterdam; again republished in London in 1652; translated by Needham, London, 1663.
[2] Dict. Nat. Biog., *Selden.*
[3] Nys, Les Origines du Droit International 386-387.
[4] Ibid 386.
[5] Senior, Early Writers on Maritime Law, L.Q.R. xxxvii 323; for the existing continental authorities on whom Welwod drew see ibid 330-335; for other English authorities see below 130-135; the full title is "An Abridgement of all Sea Lawes; gathered forth of all Writings and Monuments, which are to be found among any people or nation, upon the coasts of the great ocean and Mediterranean sea"; there was a second edition in 1636, and it was republished in the 1686 edition of Malynes' Lex Mercatoria.

*Law;*[1] and Zouche wrote a *Descriptio Juris et Judicii maritimi* —a short tract, based wholly on classical Roman law, and divided into two parts, of which the first deals with the law of ships, and the second with the trade carried on by ships.[2] But, except for these works, the only literature is of a controversial kind. Just as Cæsar defended the legal position of the court of Requests, so Zouche and Godolphin defended the jurisdiction of the court of Admiralty from the attacks made upon it by the common lawyers. Zouche's work entitled *The Jurisdiction of the Admiralty of England asserted against Sir Edward Coke's Articuli Admiralitatis in chap. xxii of his Jurisdiction of Courts*,[3] is a very able statement of the case for the Admiralty. Godolphin, who had acted as judge of the court in 1653, in his *View of the Admiral Jurisdiction*,[4] shortly describes the law and procedure of the court; but the book is mainly occupied with a defence of its claims to the various species of jurisdiction which had been denied to it by the common lawyers.[5] We shall see that the great work of this period on the whole of the Law Merchant—maritime and commercial—was written not by a lawyer, but by the merchant Gerard Malynes.[6]

During the earlier part of this period no great books were written on ecclesiastical law. Political events are a sufficient explanation of this fact. The study of the canon law was in every way discouraged.[7] The project of making a codification of English ecclesiastical law had failed.[8] The law which the ecclesiastical courts were expected to administer was so much of the mediæval canon law as was applicable to the new situation; and, in their efforts to administer it, they were hampered at almost every turn by the writs of prohibition issued by the common law courts.

One of the earliest books on this subject is Sir Thomas Ridley's *View of the Civile and Ecclesiasticall Law.*[9] Ridley was a Cambridge D.D., an Oxford D.C.L., and an advocate of Doctors' Commons. He had held the post of master in Chancery,

[1] Pt. II. c. 1 §§ 2, 3; Pt. III. c. 1 § 3; for this work see below 12-13.

[2] First published at Oxford in 1640.

[3] First published in London 1663 after the author's death by Dr. Baldwyn; also published in the 1686 edition of Malynes' Lex Mercatoria.

[4] The full title is, "*συνηγορος θαλασσης*, a view of the Admiral Jurisdiction, wherein the most material points concerning the Jurisdiction are fairly and submissively discussed, as also Divers of the Laws, Customs, Rights, and Privileges of the High Admiral of England by Ancient Records and other arguments of law asserted"; it was first published in 1661, and republished in 1685. Spelman also wrote A Tract of the Admiralty Jurisdiction and the Officers thereof, Collected Works (Ed. Gibson) Pt. II. 217-232.

[5] Of the thirteen chapters of the book chaps. 5-11 and 13 deal with these points.

[6] Below 131-135. [7] Vol. iv 228, 232. [8] Above 7.

[9] The book was first published in 1607, and other editions appeared in 1634, 1676, and 1684.



chancellor of the diocese of Winchester, and vicar-general for Archbishop Abbott. His book, which is dedicated to, and won the approbation of James I., was occasioned, he tells us, by the fact that men "meanly esteemed the Civile and Ecclesiasticall law of this land"; and by the increase of writs of Prohibition which prevented its regular enforcement.[1] The first part of the book describes briefly the parts of which the civil and canon law consist. The second part deals with those "few titles" of the civil and canon law which were used in England.[2] After dealing very shortly with the civil and criminal jurisdiction of the Admiralty,[3] "matters of forrein treaty,"[4] the "ordering of martiall causes,"[5] "the judgments of ensignes and arms,"[6] and "the successions of Princes to places of Honour,"[7] he takes up the subject of "the use which the Canon Law hath in this Realm."[8] The third part begins by describing the manner in which the civil and ecclesiastical jurisdiction "is impeached by the common law of this land."[9] It then deals with the whole question of tithes at somewhat disproportionate length,[10] and goes on to discuss defamation,[11] and bastardy.[12] In the fourth part various suggestions are made for improving the civil and canon law as administered in England. Among others he proposes some very necessary reforms in the law of executors and intestate succession.[13] One weakness of the law which he points out is still unremedied—"By the Law of the Land there is no provision to preserve the state of a prodigal person from spoyle."[14] He brings the work to a close with a chapter on "the necessity of retaining the practise of the Civile and Ecclesiasticall Law in this Land."[15] The book deals mainly with ecclesiastical law. It is learned and clearly expressed; but it is somewhat discursive, and not very well proportioned.

[1] Epistle to the Reader.

[2] "Of those goodly and excellent Titles of the Civile and Canon law, so full of wisdome, so full of variety, so well serving for every moment, and state of the commonwealth, in peace or in warre, as nothing can be more, the Professors thereof have very little use here within this Realm," Pt. II. c. 1 § 1.

[3] Pt. II. c. 1 §§ 2, 3. [4] Ibid § 4. [5] Ibid § 5.

[6] Ibid § 6. [7] Ibid §§ 7, 8. [8] Ibid c. 2.

[9] Pt. III. c. 1. [10] Ibid cc. 2-6. [11] Ibid c. 7 § 1.

[12] Ibid § 2. [13] Pt. IV. c. 2 § 2; cf. vol. iii 556-558, 591.

[14] Pt. IV. c. 2 § 2, p. 384 (ed. 1676)—"By the law of this land, there is no provision to preserve the state of a prodigal person from spoyle, which neither hath regard of time nor end of spending, unless the father provide for this mischief in his will, or by some other good order in his life, but he is suffered to waste and spend his goods till there be nothing left (as though the Prince and Commonwealth had no interest in such a subject to see he did not waste his estate and abuse his goods) whereby many great houses are overthrown; and many children whom the fathers carefully provided for, never leaving raking and scraping all their life time, that their children after them might live in great plenty and abundance, come to great shame and beggary."

[15] Pt. IV. c. 3.

Zouche wrote two tracts on this branch of the civilian's practice. One, entitled *Descriptio Juris et Judicii Ecclesiastici secundum Canones et Constitutiones Anglicanas*,[1] is slight in character, but it is a good deal more clearly arranged, and more comprehensive than Ridley's book. The first part deals with different orders of ecclesiastical persons; the second with ecclesiastical property, contracts, and delicts; the third with ecclesiastical courts and punishments; and the fourth with legal proceedings to enforce the various branches of ecclesiastical jurisdiction. The author shows a very competent knowledge of the canon law and the civil law, but he does not deal adequately with the English decisions which defined the relation of the ecclesiastical law to the common law. Zouche's other work, a tract entitled *Descriptio Juris et Judicii Sacri ad Quam Leges quae Religionem et Piam Causam respiciunt reperiuntur*,[2] is pure Roman law. It was perhaps useful to a student beginning the subject because it summarized shortly the basis upon which the law rested; but it can hardly have had any other use.

The most practically useful book of this period was the book on Testaments,[3] written by Henry Swinburn, the judge of the consistory court of York. Swinburn, it would seem, had designed to treat not only of Testaments, but also of Marriage, and Tithes. But of the treatise of Marriage only the part dealing with Spousals was finished; and it was not published till 1686, long after his death.[4] He did not live to write the other parts which were to have dealt with Marriage and Divorce; nor did he live to write his work on Tithes.[5] His book on Testaments gives, as we have seen,[6] a very useful summary of the law of wills and executors as administered in the ecclesiastical courts. It was in fact more possible to write a good book on this branch of the ecclesiastical jurisdiction than on any other. In the first place, it was not so deeply affected by the break with the mediæval canon law, because the canon law had no general rules dealing with this subject—what rules there were were English rules;[7]

[1] First published at Oxford, 1636. [2] First published at Oxford, 1640.

[3] First published in 1590; the book thus describes itself on its title page: "A briefe Treatise of Testamentes and last Willes . . . compiled of such lawes Ecclesiasticall and Civile as be not repugnant to the lawes customes and statutes of this Realme nor derogatorie to the Prærogative Royall. In which Treatise also are inserted divers statutes of this land together with mention of sundrie customes as well General as Particular not impertinent thereunto, besides divers Marginall notes and Quotations not to be neglected especially of Justinianists or young Students of the Civile Law."

[4] The book is entitled, "A Treatise of Spousals or Matrimonial Contracts, wherein all the questions relating to that subject are ingeniously debated and resolved"; it consists of eighteen sections.

[5] Preface to the Treatise on Spousals. [6] Vol. iii chap. v.

[7] Vol. i 629; vol. iii 553 n. 8, 554.



and in the second place it had no bearing upon the political and doctrinal changes of the Reformation.

The first really able books upon ecclesiastical law as a whole were written by Godolphin[1] in the latter half of the seventeenth century. The controversies as to jurisdiction between the common law courts and the ecclesiastical courts were then to a large extent settled; and Selden, Spelman, and Prynne,[2] by their works on the antiquities of church history, had made it more possible to form reasonably correct opinions on many topics of ecclesiastical law. His *Repertorium Canonicum*[3] summarizes in a manner which anticipates the eighteenth century treatises of Gibson and Burn, the ecclesiastical law as observed in England, and its relation to the common law. His *Orphan's Legacy or a Testamentary Abridgment* deals in three parts with the law of (1) Wills, (2) Executors and Administrators, and (3) Legacies and Devises, from the point of view not only of the ecclesiastical law, but also of the common law, and of the rising jurisdiction of the Chancellor.[4] To this topic—on the border line between the ecclesiastical and the common law—the common lawyers also contributed something. Either Dodderidge or Thomas Wentworth wrote a treatise on wills and executors for students, almost entirely from the point of view of the common law, which was several times reprinted and brought up to date.[5] Of this subject I have already said something,[6] and I shall have something more to say later. But I shall wait till I reach the eighteenth century before dealing with some of the other important topics in the history of English ecclesiastical law since the Reformation.

The last of the branches of law with which the civilians were concerned was that connected with the military and the other business belonging to the Marshal's court.

We have seen that some of the civilians were employed to administer the law applicable to the army.[7] That law took its rise in the court of the Constable and the Marshal; and, besides exercising this jurisdiction, the court had certain other kinds of jurisdiction, notably in cases concerning heraldry.[8] Zouche has

[1] Above 12.

[2] For the work of these men see below 404, 405-412.

[3] The full title is "Repertorium Canonicum, or an Abridgment of the Ecclesiastical Law of this Realm consistent with Temporal," it was first published in 1678, and republished in 1680 and 1687.

[4] First published in 1674, republished in 1677, 1685, 1701.

[5] "The Office and Duty of Executors, or a treatise of Wills and Executors directed to Testators in the choice of their Executors and contrivance of their wills" (1641); the preface justifies the publication of the treatise in English, and explains that it is written for students; for Dodderidge see below 345, 391-392, 394.

[6] Vol. iii chap. v. [7] Above 8. [8] Vol. i 573-580.

given some description of both these pieces of jurisdiction in the two parts of his *Descriptio Juris et Judicii Militaris.*[1] The first part is "De Jure Militari et de jure militiæ armatæ," and the second "De Jure militiæ civilis, sive de jure nobilitatis." Both parts deal with the subject solely from the point of view of Roman law. No English parallels or authorities are cited; and from this point of view they are inferior to Duck's description of this jurisdiction in his book: *De usu et auctoritate Juris Civilis.*[2] The whole question of martial law and of the jurisdiction of the Constable and Marshal's court was, as we have seen, one of those disputed questions of public law which were in issue in the seventeenth century.[3] We have seen that as a result of these controversies martial law wholly changed its shape, and that the court of the Constable and Marshal ceased to exist.[4]

The two branches of the civilians' practice of the greatest permanent importance at this period are those connected, in the first place, with international law, and, in the second place, with commercial and maritime law; and with them I propose to deal in this chapter. But before dealing with the origins and development of these two branches of law I must say a few words about certain books which some of these civilians produced on the theory of the law, on the relation of the civil law to the common law, and on the history of the civil law. They form a class of legal literature, adapted to the needs of students, which, during the greater part of this period, was badly represented in England outside their writings.[5] The largest part of the literature of the common law consisted, as we shall see, of reports, abridgments, and books of precedents for conveyancers or pleaders —works well adapted to the needs of practitioners, but very ill adapted to the needs of students.[6] There were two main reasons why the civilians were the first to produce this class of legal literature. Firstly, the common lawyers' training in the Inns of Court was wholly practical, while the civil lawyers' training at the universities and at Doctors' Commons was both academic and practical.[7] Secondly, the common lawyers knew only their own system, while most of the civilians were compelled to know not only their own system, but also something of the common law. This led them to compare the two systems; and such a

[1] First published at Oxford in 1640.
[2] Bk. ii c. viii Pt. III. §§ xiii-xxii; for this book see below 24.
[3] Vol. i 576; vol. vi 54, 226. [4] Vol. i 576-578.
[5] This fact is noted in the Preface to Wentworth's Executors.
[6] Below 355-412 for the literature of the common law during this period.
[7] Spelman once said that the common lawyers "were all for profitt and lucrando pane, taking what they find at market without enquiry whence it came," Original of Terms, Collected Works (Ed. Gibson) Pt. II. 99.



comparison naturally helped them to emancipate their minds from the technicalities of practice, and led them to consider the principles underlying the detailed rules upon many topics which were common to both systems. It is true that a few students' books on the theory and rules of English law began to appear during the latter part of this period. But we shall see that these are for the most part exceptions of the rule-proving sort. The most successful of them were written by men like St. Germain, Bacon, or Dodderidge, whose learning was far from being merely the learning of the common law.[1]

The best specimen of the literature on the theory of the law is to be found in the *Elementa Jurisprudentiæ, Definitionibus, Regulis, et Sententiis selectioribus Juris Civilis illustrata*[2] of Richard Zouche. Zouche, as we shall see, has won enduring fame as one of the founders of our modern international law.[3] He is perhaps equally remarkable as the earliest English writer on Jurisprudence; and, as we might expect from a writer on such a subject, for the orderly and logical manner in which he planned his series of legal writings,[4] and arranged their contents. So remarkable a man must be dealt with at somewhat greater length than most of his brother civilians; and therefore I shall, in the first place, say something of his life, and, in the second place, give some account of his works.

Richard Zouche[5] was born in 1589, and was educated at Winchester and New College, Oxford. He was admitted as an advocate of Doctors' Commons in 1618, and took the degree of D.C.L. in 1619. In the following year he was appointed regius professor of civil law at Oxford. In 1621 and 1624 he was elected member of Parliament for Hythe, through the influence of his cousin Lord Zouche, the Lord Warden of the Cinque Ports. In 1625 he became principal of St. Alban Hall. He took a leading part in academic life, helping to carry through the Laudian codification of the statutes of the university, and acting as assessor of the Vice-chancellor's court. But, notwithstanding his activities at Oxford, he had a considerable practice in London, and in 1641 was made judge of the court of Admiralty. As was

[1] Below 238 seqq., 266-269, 345. [2] First published at Oxford, 1629.
[3] Below 58-60.
[4] Professor Holland has given us a useful catalogue of his writings in the Introd., pp. vii-ix, to Zouche's work on "Jus inter Gentes" which he has edited for the series of Classics of International Law.
[5] I have taken my account of Zouche from Professor Holland's Introd. to the edition of Zouche's work on international law above mentioned; vol. i of this edition consists of a reproduction of the first edition (1650), and vol. ii of an excellent translation by Professor Brierly; cf. also Les Fondateurs du Droit International 269-330; Phillipson, Journal Soc. Comp. Leg. ix 281 seqq.; Wood, Athenæ Oxonienses (Ed. Bliss, 1817) iii 510-514.

then the case with most of the civilians, his sympathies were with the king; and in 1649 he was deprived of his office of judge of the Admiralty. But he was not deprived of his offices in the university; and in 1654 he served on the commission which tried for murder Don Pantaleone Sa, the brother of the Portuguese ambassador.[1] In February, 1661, he was reinstated in his position as judge of the Admiralty, but he died less than a month after. Anthony Wood says of him that he was "an exact artist, a subtile logician, expert historian, and for the knowledge in and practice of the civil law, the chief person of his time, as his works, much esteemed beyond the seas (where several of them are reprinted) partly testify."[2]

The number and variety of his writings are astonishing for a man whose employments were so varied. That they were so numerous and so varied is due partly to his industry and partly to his logical and orderly mind. As early as 1629 he had mapped out for himself the whole field of law in his *Elementa Jurisprudentiæ*. The object of the law, as he conceived it, was to administer justice.[3] The subject matter of the law was human intercourse. The law therefore could be grouped round the different varieties of human intercourse. Thus we get the intercourse between private persons; between private persons and the sovereign; between persons holding special positions—ecclesiastical, military, and nautical; and, lastly, between sovereign and sovereign.[4] Most of his writings are monographs upon these varieties of human intercourse. Thus we get books upon feudal, ecclesiastical, military, maritime, and international law. And these books are as a rule all arranged on a similar plan. He treats first of Jus, or substantive law, under the heads of Status, Dominium, Debitum, and Delictum; and then of Judicium, or adjective law, under the same heads.

With some of these books I have already dealt;[5] and with his most important book on *Jus inter Gentes* I shall deal later.[6] Here I need only mention his *Elementa Jurisprudentiæ* and his books on feudal law.

[1] Below 46.

[2] Wood, op. cit. iii 511.

[3] Elementa Jurisprudentiæ Pt. I. § 2, "Finis vero Jurisprudentiæ est Justitia, quæ est constans et perpetua voluntas jus suum cuique tribuendi."

[4] Ibid § 6, "Post Jurisprudentiæ Finem, Subjectum in quo versatur est considerandum. Illud autem est communio humana universa, quæ virtute Jurisprudentiæ sustinetur, quod primum cernitur in Communione privata quæ circa res et negotia singulorum inter privatos, sive ejusdem Principis subditos occurrit. Deinde, in Communione publica, quæ circa res et munera publica inter subditos et Principes suos existit. Tum, in communione speciali, quæ est inter eos qui jure aliquo speciali utantur, utpote municipali, sacro, militari, aut nautico. Et denique in communione generali, quæ inter diversos Principes et Respublicas per Legationes, Fœdera, et Bella exercetur."

[5] Above 12, 14, 16.

[6] Below 58-60.



The *Elementa Jurisprudentiæ* is confessedly based on Roman law. But, because it is comprehensive in its scope, it is well-fitted to give a student beginning law a few general ideas as to the leading principles and divisions which must occur in most systems of law. It is divided into seven parts. The first part contains definitions of jurisprudence and justice, and of jus naturale, jus gentium, and jus civile; and gives the general scheme of the work. The second part contains some generalities about law, persons, things, and acts. The third part deals with private law, and the fourth with public law. The fifth part deals with procedure in general, and the sixth and seventh parts with procedure in private and public law respectively. Throughout parts 3-7 we find the same main lines of division into status, dominium, obligatio, and delict which reappear in almost all his works.

Zouche's two works on feudal law are entitled respectively *Descriptio Juris et Judicii feudalis secundum consuetudines Mediolani et Normanniæ pro introductione ad studium jurisprudentiæ Anglicanæ*, and *Descriptio Juris et Judicii temporalis, secundum consuetudines feudales et Normannicas*. The first was published in 1634, and the second in 1636; and the first probably and the second certainly were inspired by Spelman's treatment of "Feuds" in the first edition of his Glossary,[1] published in 1626. Maitland has said,[2] "Were an examiner to ask, who introduced the feudal system into England? one very good answer, if properly explained, would be Henry Spelman, and if there followed the question, what was the feudal system? a good answer to that would be an early essay in comparative jurisprudence. Spelman reading continental books saw that English law, for all its insularity, was a member of a great European family, a family between all the members of which there are strong family likenesses. This for Englishmen was a grand and a striking

[1] In his address to the reader prefixed to the second of these books Zouche says, "Deinde cum diu compertum sit eos qui Juri civili apud nos student Juris Patrii cognitionem parum aggredi, quod Consuetudines quæ sunt hujus juris Fundamenta (prout apud alias gentes) scriptæ non sint, pro Introductione ad studium Jurisprudentiæ Anglicanæ Juris temporalis descriptionem conati sumus contexere, eandemque illustrare primo a Consuetudinibus Mediolanensium feudalibus quæ adeo ad cognitionem Juris Anglicani conducunt, ut vir in ejus origine investiganda sagacissimus nostratibus pro defectu imputet, quod in eas inquirere negligentius prætermittant. Deinde a Consuetudinibus Normanicis"; Spelman had said in 1629 sub voce *Feodum*, "Feodorum nostrorum origo et antiqua scientia e jure feudali (jurisconsultis nostris) nimium incognito) expetenda sunt"; his later work, written in 1639, on "The Original Growth, Propagation and Condition of Feuds and Tenure by Knight Service in England," Collected Works (Ed. Gibson) Pt. II. 1-46, was written to meet some exceptions which had been taken to this view in the *Case of Tenures* argued before the Irish Judges; from this controversy we can date the beginning of the historical problem, still not settled, as to the extent to which English constitutions can be traced back continuously to the Anglo-Saxon period; for Spelman's influence on English law and history see below 404.

[2] Constitutional History 142.

discovery; much that seemed quite arbitrary in their old laws, now seemed explicable. They learned of feudal law as of a mediæval *jus gentium*, a system common to all the nations of the West. The new learning was propagated among English lawyers by Sir Martin Wright; it was popularized and made orthodox by Blackstone in his easy attractive manner." It was indeed "a grand and striking discovery" for a professor of the civil law at Oxford. The Libri Feudorum were books which came within his province.[1] This suggestion of Spelman's therefore gave him an opportunity to teach those of his pupils, who intended to go from the university to the Inns of Court, something which would help them to understand their English law. Zouche's tracts show that he at least took this opportunity; and it is probable that they did something to begin the propagation of that learning about feuds[2] which seemed to offer, and to a certain extent gave,[3] an easy and a scientific explanation of many of those half obsolete rules of the mediæval land law, the original meaning of which was fast being forgotten.[4]

That other civilians besides Zouche were alive to the necessity of showing the relation between the rules of English and Roman law, can be seen from some of the works of Cowell, and Fulbecke, which had been published at a slightly earlier date.

Cowell is known to general history because, in his famous *Interpreter*, he stated opinions in favour of royal absolutism in a concise and extreme form.[5] But he was otherwise a man of some academic mark, having held at Cambridge the posts of regius professor of civil law, master of Trinity Hall, and vice-chancellor. He was also a member of Doctors' Commons, and had acted as vicar-general to Bancroft. The two books which I must here

[1] Vol. ii 142.

[2] Thus West, Symboleography (ed. 1618) defines feoffment as "donatio feudi"; but he was aware of the meaning which English lawyers attached to it—"with us it is properly any gift or grant . . . to another and his heirs for ever, by the delivery of seisin and possession"; for West and his book see below 389-390.

[3] As Maitland says, op. cit. 143, "Most undoubtedly there was much in our old law which could be explained only by reference to ideas which had found a completer development beyond seas, and to Blackstone and to Wright, and above all to Spelman, we owe a heavy debt. But since Blackstone's day we have learned and unlearned many things about the Middle Ages. In particular we have learnt to see vast differences as well as striking resemblances, to distinguish countries and to distinguish times."

[4] Spelman once said, Original of Terms (Collected Works (Ed. Gibson) Pt. II. 99), "I do marvel many times that my lord Cooke, adorning our laws with so many flowers of antiquity and foreign learning, hath not (as I suppose) turned aside into this field, from whence so many roots of our law have of old time been taken and transplanted"; probably it would have been better for English legal history if Coke had turned aside to this field instead of relying upon the Mirror of Justices, below 475; perhaps one reason why it never attracted him (if he knew of it) was his thorough knowledge of the mediæval land law; he had no need, or thought he had none, for the learning of feuds, in order to explain Littleton's law.

[5] Gardiner, History of England ii 66-68.



notice are his *Institutiones Juris Anglicani ad methodum et seriem institutionum Imperialium compositæ et digestæ*,[1] and his *Interpreter or Booke containing the signification of Words*."[2]

The objects of the *Institutiones* were to promote the union of Scotland and England by pointing out the resemblances between the common law and the civil law;[3] to give the student of the common law some knowledge of the general principles of law; and to show the students of the civil law that if they would study the common law, they would improve their knowledge of both laws,[4] and cease to be regarded as mere children in legal knowledge.[5] That these ideas were sound is fairly obvious; and at the present day they are, in effect, attained by the training in English law, Roman law and Jurisprudence which students of law at the universities now get.[6] But they were in advance of their time; and the mode in which the book was planned and executed did not altogether recommend them. Cowell follows exactly the order of the books and titles of Justinian's Institutes, and forces the English material into this exotic mould. The book is learned. The leading English authorities are cited for the propositions in the text. But the arrangement of the Institutes was no more suitable to English law in the time of Cowell than it was in the time of Bracton. From it a civilian might learn a smattering of English law: a student of the common law would have felt a little lost if he had started learning English law from it, and then turned to the English authorities.

The *Interpreter* is a very much more useful book. Cowell had been obliged, for the purpose of his *Institutiones*, to consider the meaning of the principal technical terms of English Law, and he had added to that book a glossary of obscure words. He had seen, as he tells us in the preface, that the common law had not

[1] First published in 1605, republished 1630.

[2] First published 1607; reissued in an expurgated form 1637, 1672, 1684; edited by Kennet, 1701, 1709, 1727.

[3] "Siquidem hæc duo regna potentissima, quæ ille (James I.) non sine magna tum pietate tum prudentia conglutinare cupit, hoc modo facillime non ad legum similitudinem, sed ad similitudinis quæ est, notitiam redigeret: quo vinculum nullum vel ad conjunctionem arctius, vel ad perpetuitatem firmius esse potest," Epistola Dedicatoria, 10 (ed. 1630).

[4] "Non magis itaque nonnullis juris Anglicani candidatis hoc vitio vertere soleo, quod statutorum cortici et particularibus rerum judicatarum exemplis mordicus adhærescentes, universalem juris naturalis rationem suavemque ἐπιεικειαν nihil morantur, quam juris Romani alumnis, quod perpetua rerum exterarum contemplatione abrepti, vel vitæ praticæ curam omnem abiiciunt, vel angustis causarum Ecclesiasticarum cancellis inclusi, latiorem illam fructuosioremque hujus disciplinæ partem ne quidem a limine salutant," Præfatio, 15-16.

[5] "In nostra Republica, non dico hospites et peregrini, sed plane infantes maneamus," ibid 13.

[6] "The attempt well deserved success, and might have anticipated the reforms of two centuries later in the university study of law," E. C. Clark, Cambridge Legal Studies 74-75.

yet got a law dictionary of the kind familiar to the civilians; and he set himself to supply its place.[1] Unfortunately the book trespassed upon the domain of politics by expressing pronounced absolutist views in its definitions of Prerogative,[2] Parliament,[3] and Subsidie.[4] Moreover, Cowell had quoted some of the reflections of Hotman on Littleton, and had drafted the complaints of the clergy against prohibitions for Bancroft. Coke and the common lawyers therefore combined with the constitutional opposition to attack Cowell and his book;[5] and James I. thought it politic to disown him. The book was suppressed by royal proclamation; but the Parliament, by sanctioning such a method of suppression, could not logically complain when similar methods were applied to suppress the publication of other views upon debatable points of law.[6] For the rest, the book is clearly expressed and many of the definitions are happy—Blackstone copied from it his definition of the Prerogative, with only a slight (though a very crucial) verbal alteration.[7] That it long remained the standard Dictionary of English law can be seen from the fact that in 1727 it had passed through seven editions.

Fulbecke is a diffuse and sometimes a quaint writer, who liked to introduce illustrations and digressions from his very miscellaneous reading. But his *Parallele or Conference of the Civil law the Canon law and the Common Law of this Realme of England*[8] is more instructive than Cowell's *Institutiones*, because its method is more suited to the subject. Fulbecke tells us that

[1] "The civilians of other nations, have by their mutuall industries raised this kinde of worke in their profession, to an unexpected excellencie. I have seene many of them that have bestowed very profitable and commendable paines therein: and lastly one Calvinus a doctor of Heidelberge."

[2] Thus he said, "Now for those regalities which are of the highest nature . . . there is not one that belonged to the most absolute prince in the world which doth not also belong to our King."

[3] For the passage see Prothero, Documents 410.

[4] "Some hold opinion that the subsidie is granted by the subject to the Prince in recompence or consideration, that whereas the Prince of his absolute power might make lawes of himself, he doth of favour admit the consent of his subjects therein."

[5] Senior, Doctors' Commons and the Old Court of Admiralty 86-88; below 432; vol. i 595 n. 1.

[6] Spedding, Letters and Life of Bacon iv 345-346, after alluding to the cases of Cowell and Floyd, points out that, "When measures like these were not only allowed by a House of Commons, famous for its championship of the subjects' liberty, to pass without remonstrance, but were welcomed with gratitude and applause as the fit retribution for the utterance of opinions supposed to be derogatory to the Privileges of Parliament, we cannot wonder that exception was occasionally taken by the Council to opinions supposed to be derogatory to the Prærogatives of the Crown, and that the Crown lawyers were called upon to prove their authors guilty of contempt."

[7] Cowell defines it as "that especiall power preeminence or privilege that the King hath in any kinde over and above other persons, and above the ordinarie course of his common law, in the right of his crowne"; Blackstone, Comm. i 232, defines it as, "that special preeminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity."

[8] First published 1601; a second edition was published in 1618.



it seemed strange to him "that these three laws should not, as three Graces, have their hands linked together, and their lookes directly fixed the one upon the other, but like the two faces of Janus, the one should be turned from the other, and should never looke toward or upon the other."[1] He therefore attempted to throw the resemblances and differences between these laws into the form of fifteen dialogues between a canonist, a civilian, and a barrister, upon various legal topics; and, to this part of his book he added a second part, consisting of seven more dialogues. In the debate between the various parties to these dialogues the resemblances and differences between these different laws could be made to appear much more readily than by the process of trying to force the subject matter of English law into the mould of Justinian's Institutes. Fulbecke also wrote *A Direction or Preparation to the Study of the Law*,[2] intended to be a guide to students beginning to read law. In parts the book deals in generalities, and sometimes quaint speculations. Thus the first two chapters are occupied with a description of the excellence of the law, and the qualities desirable in a student of it. In the third chapter there is a disquisition, fortified by a reference to many authorities, on the question whether morning or evening study is the better; and quite a sound defence of the charge that the lawyers used barbarous words.[3] The pages in which he gives a list of books in the civil and common law, accompanied in the latter case by a few acute criticisms, are perhaps the most useful part of the book.[4] Some account is given in chapter iv of rules of legal interpretation, and in chapter v some sound advice as to methods of study. In particular we may note the advice to the student, needed as much in the twentieth as in the seventeenth century, not to rely on other people's Abridgments, but to make his own.[5] In the latter part of the book the student is told at some

[1] Preface to the Reader.

[2] First published 1600, and re-published in 1620.

[3] The following passage at f. 21 (*b*) illustrates his style—"the words of the law may be compared to certain images called Sileni Alcibiadis whose outward feature was deformed and ugly, but within they were full of jewels and precious stones: so the words of the law, though they be rude in sound, yet are they pregnant in sense."

[4] ff. 26*b*-29; the authorities recommended in Roman law are, besides the Texts, Bartolus, Baldus, Paulus de Crasto, Decius, Alciat, Zasius, Budaeus, Duaren, Cujas, Hotoman, Donellus, and Gentili; for his panegyric of Gentili's work see below 52-53; the authorities recommended in English law are the Y.BB. Plowden, Dyer, Bracton, Britton, Glanvil, Fortescue, Littleton, Fitzherbert, Brooke, Perkins, Staunford, Rastell, Theolall, Lambard, and Crompton.

[5] f. 44 (*a*), "Neither is it safe to trust to other men's Abridgments, which are little available to such as have read a little; but that which we by our own sweat and labour do gain, we do firmly retain. . . . And I am persuaded there hath never been any learned in the law, and judicial, who hath not made a collection of his own, though he hath not neglected the Abridgments of others."

length always to try to get at the reason of the law, and certain elementary words and phrases are explained. It closes by a practical example from Littleton, and from a Year Book case, of the proper method of making an analysis. The book broke new ground, and, as we shall see, rival works were published by common lawyers in the latter part of this period.[1] That it was in a measure successful can be seen from the fact that it was reprinted with very few alterations in 1829.

One of the best books produced by the civilians of this period was Duck's historical work *De Usu et Authoritate Juris Civilis Romanorum in Dominiis Principum Christianorum*,[2] in which he was assisted by Gerard Langbaine, provost of Queen's College, Oxford.[3] The first book contains a careful account of the growth and diffusion of the Roman law, and of the sources of the civil and canon law, together with a description of the *Libri Feudorum*. The second book contains a very clear account of the extent to which the Roman law had been received in the principal countries of Europe. The eighth chapter of this book, in which he deals in three parts with the history of Roman law in England, is the longest; and it gives the best continuous account of the influence, study, and practice of Roman law in England that has yet appeared. The third part of that chapter is particularly valuable because it gives an account of the then existing condition of the civil law in England from the personal experience of a practitioner.

Duck was a royalist, and he wrote his book during the course of the Great Rebellion. He describes with some pathos how sieges, rapine, proscription, and sequestration had interrupted his work, and how all these evils had been aggravated by the death of his wife.[4] He had seen the criminal and corrective jurisdiction of the ecclesiastical courts abolished,[5] and the common law triumphant. Naturally he was very pessimistic as to the future of the civil law in England. "Unlearned scribes and notaries," he says, "contend with professors, and the common lawyers

[1] Vol. vi 600-602; for books published in this period see below 396-401.

[2] The dedication is dated 1648, and the book was first published in 1653; it was translated by J. Beaver in 1724.

[3] Wood, Athenæ Oxoniensis (Ed. by Bliss 1817) iii 258, says that in this book "Dr. Gerard Langbaine's labours were so much that he deserved the name of co-author."

[4] "Porro Lectoris mihi benignitatem conciliabit, quod hæc scripserim in furore Belli Civilis, ubi leges minimum locum habent, et quod has cogitationes meas descripserim sæpius perturbatas vel ex Civitatum in quibus commoratus sum obsidione, vel ex rapinis, proscriptionibus, sequestrationibus, confiscationibusque prædiorum et bonorum meorum; et quod inter hæc infortunia præ reliquis omnibus me afflixerit mors carrissimæ uxoris meæ Margaretæ Southworthiæ, feminæ sanctissimæ, prudentissimæ, modestissimæ conjugisque incomparabilis," Conclusio operis.

[5] 16 Charles I. c. 11; vol. i 431, 611.



blame us for pursuing the useless learning of foreign laws, and accuse us of being citizens of a foreign state and strangers in our own." "Let us therefore," he concludes, "warn the young men of our university to leave the study of the civil law to foreign nations, and devote themselves to the study of the laws of their own country, from which they can obtain riches and honours. For me, it is sufficient to have shown that the study of the civil law was once held in high esteem; and it seems now that those French lawyers Stephen Forcatulus, and Renatus Choppinus, were true prophets when they said that the time would come when the civil law would cease to be used in England."[1] The Great Rebellion did diminish the sphere of the civilians' practice, notably in the department of commercial and maritime law. But matters were not quite so desperate as they appeared to Duck, writing under the stress of civil war and domestic affliction. We shall see that, after the Restoration, the civilians could still find employment in advising upon international questions, in the revived ecclesiastical courts, and in dealing with the comparatively small amount of jurisdiction which was still left to the Admiralty.

We must now turn to the consideration of the history of those two branches of law—international law, and commercial and maritime law—which, during this period, the civilians had helped to shape, and to make integral parts of English law.

## II

### International Law

International law forms an important part of the law of all civilized states. To what extent and in what manner its rules are recognized by the law of any given state is a question which depends on the municipal law of the particular state. In England the mere fact that a given rule is an ascertained rule of international law does not by itself give it validity as a rule of English law.[2] But in many cases, where such rules are observed by

[1] Bk. ii c. viii Pt. iii § 32, "Juris consulti nostri Muncipales nos insectantur, quod peregrinas leges apud nos inutiles investigemus, et quod cives simus in aliena republica, hospites in nostra, cum meminisse potuissent quid in eos pro nobis exteri retorserint. Sed me reprimo, et contemptis tabellionibus, cum juris consultis nostris redibimus in gratiam, monendique erunt adolescentes academici ut relicto jure civili Romanorum aliis gentibus, quae illud satis colent, ad patrias leges se convertant, ex quibus commoda et honores patriæ suæ possint consequi. . . . Mihi jam satis est indicasse, jus civile apud Anglos aliquando in honore et pretii fuisse, et videtur juris consultos Gallicos *Stephanum Forcatulum Renatumque Choppinum* recte vaticinatos fuisse, nullum juris civilis Romanorum usum in Anglia aliquando futurum esse."

[2] R. v. Keyn (1876) 2 Ex. Div. 63.

civilized states, they have been made rules of English law by the legislature.[1] Thus no English lawyer can neglect international law, and no history of English law would be complete which did not indicate its origins, and its relations to the more purely municipal branches of English law.

International law, as understood at the present day, was unknown in the Middle Ages. The law which prevails among the independent states of modern times could not arise till these independent states had been fully developed. And, as we have seen, these independent states were the result of the new political religious and intellectual conditions of the sixteenth century.[2] The division of Europe into a number of independent territorial states in constant and continuous relations with one another; the new religious ideas which finally destroyed the mediæval ideal of a single Christian Empire; the new intellectual ideas which, even in those countries which adhered to the old religion, modified men's outlook on all social, legal and political problems—all helped to create the international law of the present day. Throughout this period the material from which its rules originated was being collected by the practice of soldiers, statesmen, diplomatists, and jurists; and naturally that material was shaped by the technical conceptions of the civil law, because those concepts were known to and accepted by the courts of all the states of Western Europe—they were, as James I. said, "in a manner Lex Gentium."[3] Their practice having thus been cast into a legal mould, it was gradually perceived in many different countries that a wholly new variety of law was arising. It was inevitable therefore that the lawyers of many different countries should attempt to make some systematic statement of the principles of this new law.

The existence of and the relations between the independent states of Europe were the immediate causes of the growth of international law as we know it to-day. But the fact that

[1] E.g. the Territorial Waters Jurisdiction Act; the Foreign Enlistment Acts; the Extradition Acts.

[2] Vol. iv 190-215; as Woolf, Bartolus of Sansferrato, says at pp. 202, 203, "So long as the de jure unity of Western Europe in one Roman Empire was maintained, the mediæval Italian lawyer, who lived in conditions where Roman law was actually a common law above the conflicting statutes of Italian cities, naturally went to that common law for rules to guide international relations, which were at best de facto. De jure the Emperor was universal superior. . . . When men had given up the de jure unity of Europe under a universal Empire, and moreover when they turned their attention from intercommunal to properly international problems, a wider and a higher basis than the Roman jus commune had to be found for International law."

[3] Speech to Parliament 1609, Works (ed. 1616) 532, "I thinke that if it (the civil law) should be taken away it would make an entrance to barbarisme in the Kingdome and would blemish the honour of England; for it is in a manner Lex Gentium and maintaineth intercourse with all foreign nations."



many of the ideas which underlie our modern international law have their roots in the past, sometimes in a very remote past, is clearly stated by Grotius in the opening words of the Prolegomena to his famous treatise. "That law," he says, "which prevails as between different peoples or their rulers, either springs from nature itself, or is established by divine law, or has been introduced by custom or tacit agreement."[1] And those were in substance its three sources when Grotius wrote. The Greek law of nature had given inspiration to the rules of the Roman jus gentium; and the Roman jus gentium thus inspired had given force and practical application to the rule of right reason, on which international law ultimately rests.[2] The mediæval canonists and civilians had given a new sanction to this law of nature by almost identifying it with that law of God to which all human beings and human societies ought to conform.[3] In the Middle Ages, and still more in the sixteenth century, the practice of Western Europe was creating rules which depended on "custom and tacit agreement." But the technical form and much of the substance of the rules which came from these sources were determined to a large extent by the writings of the civilians and canonists of the Middle Ages; and in part by ideas derived from the Greek and Roman classics, which had either filtered through these mediæval canonists and civilians, or had come from the works of the classical scholars of the Renaissance.[4] It follows therefore that we must know something of these mediæval ideas and speculations, as well as something of the necessities of the new territorial states, if we would understand the technical form and the substance of the rules of this new body of law which the jurists of the sixteenth and seventeenth centuries were evolving. I shall therefore consider the history of the growth of international law in England under the following heads: The mediæval ideas; the necessities of the territorial state; the earliest English writers on international law.

[1] "Jus illud, quod inter populos plures aut populorum rectores intercedit, sive ab ipsa natura profectum, aut divinis constitutum legibus, sive moribus et pacto tacito introductum."

[2] Pollock, Camb. Mod. Hist. xii 703—"The law of nature . . . is the Greek appeal to an ideal rule justifying itself by reason, and the law of nations, in this earlier sense, is the practical Roman recognition of a working standard in the general use of civilized mankind. Both elements were necessary; *jus naturale* without *jus gentium* would be an unbodied spirit, *jus gentium* without *jus naturale* would be a soulless body."

[3] Vol. ii App. ii; vol. iv 279-282.

[4] For the anticipations of rules of modern international law to be found in Greek and Roman law see Coleman Phillipson, the International Law and Custom of Ancient Greece and Rome; cp. also Walker, A History of the Law of Nations i 37-73.

*The Mediæval Ideas*[1]

The dominant political theory of the Middle Ages, which regarded Western Europe as a single society under emperor and pope,[2] prevented the growth of anything like the international law of modern times. But the peculiar intellectual conditions which made for the supremacy of law—divine or natural or human [3]—were favourable to the growth of rules upon particular topics, which were extensively used by the founders of international law in the sixteenth and seventeenth centuries. The application of some of these kinds of law to the war-like or peaceful relations of the several communities of which Western Europe consisted, was helped by the fact that, far back in the seventh century, Isidore of Seville,[4] in the fifth book of his Etymologiæ, had adapted from Ulpian's institutes[5] certain definitions of jus naturale, jus gentium, and jus militare.[6] His definition of jus gentium, corresponds, as Nys has said, in some sort to our modern international law; while his definition of jus militare gives us some of the most important headings of a work upon the laws of war. These definitions, having been inserted by Gratian in the Decretum,[7] became the starting point of a large body of doctrine. But this doctrine did not cover the whole ground marked out in these definitions. It was only the topics which interested the mediæval speculator that were thus developed.

Of these topics by far the most important were the laws of war. As Professor Holland has said, "Just as the forms of litigious procedure are a more prominent topic in early legal literature than the substantive law itself, so were the rules which are applicable to the conflicts of States discussed before those which should govern their peaceful intercourse."[8] This phenomenon is due to two causes. In the first place, the turbulence of the Middle Ages made all questions relating to war matters of first-rate importance. In the second place, the desire to bring all the phenomena of the universe under some kind of law made the phenomenon of war very interesting both to canonists and civilians. Was war in any circumstances justifiable? If so, under what circumstances? What were just causes of war? What were the conditions under which it ought to be waged? What difference did it make if the enemy was an infidel? Under what conditions was private war justifiable? All these questions and many others were exhaustively discussed from that mixed legal and moral point of view which is characteristic of the speculations of both canonists and civilians. Other topics were comparatively of small importance. Indeed, at this period, and even in the sixteenth and seventeenth centuries, some of them were often only discussed in relation to war.[1] We get, for instance, some discussion of methods of settling disputes other than by war, and of treaties of peace and commercial treaties, and a few hints as to the position of foreign rulers and ambassadors.[2] When these topics were not discussed in relation to war, they were treated as quite separate branches of knowledge. They were not regarded as topics which belonged to one and the same department of knowledge. The only bond of union was the idea connecting all branches of knowledge in the Middle Ages—the idea that the matters with which they dealt should be regulated by some sort of law.

I shall therefore consider briefly the mediæval treatment of (i) various topics connected with war, and (ii) other topics which in modern times have become important branches of international law.

(i) *Topics connected with war.*

The legality of war was a subject of discussion all through the Middle Ages. The early fathers of the church had pronounced against war.[3] But Augustine had admitted that it might be just;[4] his opinion was followed by Gratian; and it prevailed, even though the war was waged between Christians.[5] Wycliffe, on the other hand, maintained the illegality of war between Christians in the broadest terms.[6] In the sixteenth

[1] The best and most exhaustive account of these ideas is contained in Nys's Origines du Droit International; it is on his work that I have mainly relied; cf. also Walker, op. cit. 79-137.

[2] Vol. ii 121-122, 127-128. [3] Ibid 131-132.

[4] Bishop of Seville 601, died 633; his Etymologiæ is "a complete encyclopedia of mediæval science in twenty books," Walker, op. cit. 205 n. 1; cf. vol. ii 135.

[5] Nys, op. cit. 9.

[6] The law of nature is: "Jus commune omnium nationum, et quod ubique instinctu naturæ non constitutione aliqua habeatur." "Jus gentium est sedium occupatio, ædificatio, munitio, bella, captivitates, servitutes, postliminia, fœdera, paces, induciæ, legatorum non violandorum religio, connubia inter alienigenas prohibita."

"Jus militare est belli inferendi solemnitas, fœderis faciendi nexus, signo dato egressio in hostem, vel pugnæ commissio. Item signo dato receptio; item flagitii militaris disciplina, si locus deseratur; item stipendiorum modus, dignitatum gradus; præmiorum honor, veluti cum corona vel torques donantur. Item prædæ decisio et pro personarum qualitatibus et laboribus justa divisio; item principis portio"—cited Nys, op. cit. 9 nn. 1-3.

[7] Ibid 9, 10. [8] Holland, Studies in International Law 40.



[1] Below 57. [2] Below 36-39.

[3] Nys, op. cit. 44, 45; Walker, op. cit. 204; Holland, Studies in International Law 42.

[4] Walker, op. cit. 205; Nys, op. cit. 45, 46.

[5] Ibid 98; Holland, op. cit. 43-44.

[6] "Quod homicidium per bellum vel prætensam legem justiciæ pro temporali causa, sive spirituali revelatione est expresse contraria Novo Testamento quod quidem est lex gratiæ et plena misericordiæ," Fasc. Ziz. (R.S.) 366, cited Nys, op. cit. 48.

century his views found an echo in the writings of such men as Colet, Erasmus, and More;[1] and they were deemed worthy of refutation by Suarez.[2] But they were opposed to the weight of mediæval authority, and still more to the weight both of mediæval and modern practice.[3] They still remain an ideal which from century to century has attracted the finer spirits of successive ages.

It was impossible, therefore, to maintain that all war was unjust. But it was equally impossible to maintain that all wars were just; nor was it possible to say that any atrocity might be permitted even in a just war. This obviously gives rise to two classes of questions—When will a war be considered just? and, to what laws ought the combatants in a just war to conform? To the solution of these questions the mixed moral and legal criteria of mediæval thinkers were applied. This gave rise to a large literature[4] which influenced profoundly the earliest writers on modern international law, and, through them, the law of our own times.

When will a war be considered to be just?

The starting-point of the discussion was found in some words which Isidore of Seville borrowed from Cicero as to the just war, the unjust war, the civil war, and the more than civil war. Gratian used these words in the parts of the Decretum in which he dealt with war, and enlarged upon them.[5] From him they passed into those numerous Summa which mediæval canonists composed for the use of those who heard confessions.[6] Just as these Summa are one of the roots from which sprang the idea of equitable rules superior to the rules of merely human law,[7] so they are one of the chief sources of the rules as to when war may be justly waged. The Summa of the great Hostiensis distinguished seven species of war, four of which were just and three unjust.[8] Aquinas said that the just war must comply with three requisites. It must have the authority of a prince in obedience to whose orders one is bound to wage war. It must

[1] Nys, op. cit. 48, 388-399. [2] Ibid 138.

[3] Even among those who admitted that war might be just, "Deux courants se produisent; tandis qu'une partie des auteurs est sinon trés favorable à la guerie, du moins portée a l'excuser, une autre partie s'en montre l'adversaire irréconciliable"; the former party prevailed in the sixteenth century, ibid 100, 101.

[4] For this literature see ibid c. 6.

[5] Ibid 99, 100; cf. Walker, op. cit. 206-207.

[6] Nys, op. cit. 101, 102. [7] Vol. iv 276 n. 5, 280 n. 5.

[8] Bellum Romanum, between believers and infidels—just; bellum judiciale, between believers under the authority of a judge—just; bellum præsumptuosum, waged by rebels in contempt of authority—unjust; bellum licitum, authorized by a prince—just; bellum temerarium, waged by believers against legal authority—unjust; bellum voluntarium, waged by believers on their own authority—unjust; bellum necessarium, waged by believers in self-defence—just: see Nys, op. cit. 102; Walker, op. cit. 211.



have a just cause, i.e. those attacked must have deserved to be attacked by reason of some misdeed committed by them. The intention of those who wage war must be an intention to do good or avoid evil.[1] Many other writers analysed with great minuteness the causes of war in order to decide which of them justified war and which did not.[2]

These speculations as to the justice or injustice of war were concerned with wars between Christians. Other considerations applied to wars against infidels or heretics.[3] An age which preached crusades, founded the military orders, and persecuted infidels, had no doubt whatever about the justice of such wars. But gradually distinctions were established. Innocent IV. maintained that it was unjust to wage war against the Saracens merely to convert them to Christianity. If they did not harm Christians, Christians had no right to seize their lands or goods.[4] But these views were attacked by Henry of Susa, and his views were the more popular. He denied to infidels any rights of sovereignty, and only admitted that those who lived in submission to Christian princes were immune from attack.[5] But the views of Innocent IV. gradually prevailed. It is true that Wycliffe maintained that the infidel, being deprived of grace, could be attacked and despoiled at will.[6] But Wycliffe's views were formally condemned by the Council of Constance; and at that Council the rights of infidels were maintained with much ability by one of the representatives of Poland and Lithuania, the pagan inhabitants of which countries had suffered cruelly from the inroads of the Teutonic Order.[7]

To us who have grown accustomed to the omnipotence of the sovereign state these theoretical discussions as to the justice or injustice of war may seem somewhat useless. What bearing, it may be asked, can they have upon the modern rules of international law, which accept war as a fact and attempt to regulate it without reference to its justice? The answer is that they have had two lasting and permanent effects upon the growth of the modern law.

(*a*) They have enforced the truth that war is *prima facie* a moral wrong; that it is not lightly to be undertaken; and that it needs to be justified. It may seem that this truth had little effect upon the international practice of the Middle Ages. But even then it accomplished something. The careful apologetic statements sometimes issued by rulers showed that at least lip-

[1] Nys, op. cit. 104-105.

[2] Ibid 105-124; Holland, Studies in International Law 44-50.

[3] Nys, op. cit. c. 7. [4] Ibid 144. [5] Ibid 144-145.

[6] Ibid 149. [7] Ibid 149-151.

service was paid to it;[1] and the limitations imposed upon private war by the Truce of God,[2] and the occasional cases in which disputes were submitted to arbitration,[3] are evidence that it accomplished some practical results. Above all it established a point of view which, having been adopted by the founders of our modern international law, has done much and may we hope in the future do more for the cause of peace. This may appear to be a very general—almost some may say an impalpable effect. But it is none the less real; and it has been helped by the second and more direct of the effects of this point of view upon the growth of the modern law.

(*b*) The opinion which condemned unnecessary and causeless war even against infidels inspired the works of moral theologians, like Las Casas, Franciscus de Vitoria, and Dominique Soto, in which the cruelties perpetrated by the Spaniards on the Indians were condemned.[4] These books stand at the parting of the ways between the mixed moral and legal discussions of the Middle Ages and the legal treatises on modern international law. They contained a careful reconsideration and restatement of the mediæval doctrine as to war; and the mediæval doctrine, as thus reconsidered and restated, passed into the modern law, and influenced it in two directions. In the first place, it made for the expansion of the doctrine that some law should govern international relations beyond the bounds of Christendom. The mediæval doctrines were dependent upon the moral legal and theological conceptions which governed the circle of peoples who lived within the Holy Roman Empire; and they were therefore necessarily confined to those peoples. The admission that peoples who were outside that circle had rights, showed that the conception of a law between peoples was emancipating itself, even in the minds of the most orthodox,[5] from a particular set of theological beliefs. We can see the beginnings of a development which will make international law coextensive with the civilized world.[6] In the second place, these books discussed with great minuteness all questions connected with the conduct of a war. In them we

[1] "Le soin extrême que les souverains médiévaux mettaient à établir le bien fondé de leurs réclamations, ne fût-ce que pour s'attribuer une apparence de justice, se manifeste dans leurs appels à l'opinion publique," Nys, op. cit. 56.
[2] Ibid 264. [3] Below 37.
[4] Nys, op. cit. 152-156; see Walker, op. cit. 214-230 for an analysis of Vitoria's work.
[5] See Walker's summary, op. cit. 218, 219.
[6] As Phillimore says, Commentaries on International Law (ed. 1854) i 20: "The first important consequence which flows from the influence of Natural upon International law is, that the latter is not confined in its application to the intercourse of Christian nations . . . but that it subsists between Christian and Heathen, and even between two heathen nations, though in a vaguer manner and less perfect condition than between two Christian communities."



must look for the earliest literature on the laws of war.[1] But this obviously brings us to the second of the questions discussed by mediæval writers—

To what laws ought the combatants in a just war to conform?

"In the Middle Ages," says Nys,[2] "war is characterized by unspeakable cruelty; enemies do to one another as much harm as possible; the annihilation of the enemy is the final end of hostilities. Hence unheard of acts of barbarity; hence the use of poisoned arms; hence the mutilation of prisoners, the waste, sack, and destruction of towns; hence the recourse to treachery and deceit. . . . The unimpeachable evidence of moralists, poets, lawyers, statesmen, soldiers can be appealed to; and their evidence is the same." What is the use, then, it may be asked, to recall the fruitless efforts of mediæval thinkers to impose laws upon a state which was thus treated literally as the abrogation of all law? The answer is that their efforts were not altogether fruitless, because they were the origins of practices and tendencies and speculations which lived on in the world of fact, and in the writings of modern international lawyers, till they created a public opinion, which (except in barbarous Prussia and amongst the other tribes of Central Europe whom Prussia had corrupted) has given to some of them a far larger effect than their originators could have dared to hope. There are many instances in the history of law in which the consistent maintenance of a high ideal has at length succeeded in elevating public opinion—but none is so striking as this.

Of these practices, tendencies, and speculations which passed into the writings of the founders of modern international law, and, through them, influenced and still influence the conscience of all civilized peoples, I cannot speak at length. I can only indicate very briefly one or two of the most important.

The institution of chivalry did something.[3] It helped to make universal the custom of ransoming prisoners.[4] It helped to forward the custom of releasing prisoners on parole.[5] Above all it made men see that an enemy is a human being, and should be regarded as possessing the rights of a human being; that misfortune in war calls for pity, and is not merely an opportunity for gratifying revenge. It is true the class benefited by the customs of chivalry was very limited. "To have the benefit of its courtesies as of right, a man must be a knight, or at least capable of becoming one, a woman must be in religion or a member of a knightly family. The condition of being an orthodox Christian

[1] Holland, Studies in International Law 50-55.
[2] Op. cit. 188. [3] Ibid 190-192.
[4] Ibid 245. [5] Ibid 247-248.

would have been added by many."[1] But the causes which modified the rigid class system of the Middle Ages[2] helped to diffuse the ideas of chivalry amongst a larger circle. We see on a European stage the working of that principle which Maitland has emphasized in English legal history—the law of the great men tends to become the law for all.

The influence of the preaching of the church (though its practice was sometimes contrary to its own preaching) did something. Its condemnation of certain kinds of arms,[3] its teaching that faith should be kept even with an enemy,[4] its constant prohibition of the practice of treating prisoners as slaves[5]—all helped to maintain the idea that there are some things not permissible even in war.

Another influence which made in the same direction was the growth of better discipline in the contending armies. Even in the Middle Ages some provision was made for discipline, and often there were detailed rules as to the distribution of booty, and the right to the ransom paid by prisoners.[6] But these rules were as yet but rudimentary. It was not possible to do more till the introduction of standing armies controlled by a regular military law; and at first the imperfections in the administration of this law, and the irregularity in the pay and feeding of the soldiers, sometimes caused the introduction of these standing armies to aggravate the disease. We must not expect this influence to have a regular and a constant effect in diminishing the horrors of war till quite modern times.[7]

A more important influence was that of the merchants. That influence tended, in the first place, to modify the rigour of the Roman rule that the outbreak of war broke off all relations between the contending parties.[8] In England Magna Carta provided that, though the persons and goods of alien enemies in England should, on the outbreak of war, be arrested, no damage should be done to them till it was ascertained what treatment

[1] Pollock, Camb. Mod. Hist. xii 705. [2] Vol. iv 402-407.

[3] Nys, op. cit. 192—Innocent III. forbade, "Artem illam mortiferam et odibilem ballistariorum adversus Christianos et Catholicos exerceri de cætero sub anathemate."

[4] "Gratien avait inséré dans le *Décret* le texte dans lequel saint Augustin exprime son opinion: *Fides enim quando promittitur etiam hosti servanda est, contra quem geritur*," ibid 215.

[5] Ibid 236-239—one line of reasoning favoured by Bartolus and others was that all Christians in obedience to the church were de Populo Romano, and could not therefore become slaves by capture in wars with one another.

[6] For these rules in England see authorities cited vol. i 573 and n. 2, 574-575; Nys, op. cit. 204-208.

[7] Nys says, op. cit. 201, "L'établissement d'armées permamentes servit efficacement la cause de la civilisation de la guerre"; and, as discipline became better, there can be no doubt that in the long run they have had this effect.

[8] Ibid 193-194.



the enemy country meted out to English merchants.[1] A step further was made by a clause of the Statute of the Staple, which provided that enemy merchants in England should have forty days within which to quit the country.[2] And the Hanse in many places got similar privileges for its members—even in some cases the right to continue their trade in spite of the outbreak of war.[3]

Trade again gave rise to special prohibitions against the sale of certain articles specially useful to an enemy. Such prohibitions became common in the thirteenth century.[4] Then, again, states sometimes attempted to prohibit all trade with their enemies.[5] And in these two sets of prohibitions we can see the germs of the doctrines of modern international law which are concerned with contraband and blockade.[6] But as yet the formation of these bodies of doctrines is very remote. It is the bearing of these doctrines upon the rights and duties of Neutrals that gives them the greatest part of their interest in modern law; and, as between the great states of Western Europe, the principles of the law of Neutrality were scarcely formed, even in the first half of the seventeenth century.[7] In that century, indeed, under the influence of commercial needs, they were beginning to emerge. That they were then beginning to emerge was helped by the fact that in the Middle Ages the interests of the great trading centres of Italy and South-Western Europe had pointed the way. The Consolato del Mare[8] provided for the case of a friend's ship which carried enemy goods, and for the case of an enemy ship which carried a friend's goods. In the first case the ship went free and the goods were confiscated; but the captain must be paid freight upon them as if he had carried them to their destination.[9] In the second case the goods went free, and the ship was confiscated; and the owners of the goods must come to some arrangement with the capturer. Failing this arrangement, the capturer must take the goods to the port whence he started, and could charge freight for so doing.[10]

[1] § 41—"Et si tales (mercatores) inveniantur in terra nostra in principio gwerræ, attachientur sine dampno corporum et rerum, donec sciatur a nobis vel capitali justiciario nostro quomodo mercatores terræ nostræ tractentur, qui tunc invenientur in terra contra nos gwerrina; et si nostri salvi sint, alii salvi sint in terra nostra."

[2] 27 Edward III. st. 2 c. 17. [3] Nys, op. cit. 195.

[4] Ibid 225-227; he says at p. 226, "Au XIII[e] siècle il devient usage de lancer au début de la guerre des proclamations qui défendent, sous peine de confiscation, à tous navires d'apporter des vivres ou des munitions quelconques à l'ennemi."

[5] Ibid 226—citing English ordinances of 1315 and 1357 forbidding all trade with the Scotch.

[6] Ibid 224-228. [7] Below 43-44, 47-49.

[8] For this code see below 70-71.

[9] Black Book of the Admiralty iii 362-363, 539; see Hall, International Law (6th ed.) 687.

[10] Black Book of the Admiralty iii 543-545; Hall, op. cit. 715-716.

The result of all these influences was the beginnings of a wholly new set of doctrines as to the effects of war, which waited long for its realization in the world of fact. Many writers taught that war respected neither age nor sex; and this was the prevalent doctrine when Gentili and Grotius wrote.[1] But towards the end of the fourteenth century, Honore Bonet had maintained that war is rather a relation of state to state than of man to man, and that, in consequence, it was wrong to harm those who either did not or could not take part in war-like operations.[2] We see here in germ the modern distinction between combatants and non-combatants. But it was not till the establishment of standing armies that this distinction could be clearly drawn in practice; and it was not for many centuries after standing armies had become universal that it began to bear fruit.

These influences, which were making in the direction of a law of war, were as yet vague in character and limited in extent. Some of them acquired a greater precision in the works of the great Spanish theologians of the sixteenth century. But we shall see that it was not till long after the establishment of international law as a separate system that they were recognized either in theory or practice.[2] Probably, however, war would, for a still longer period, have wanted laws, if these influences had not begun to make their appearance in the Middle Ages. As we shall see, the extent and variety of the rules and speculations which the problem of war aroused formed by far the largest part of the material bequeathed by mediæval thinkers to the founders of modern international law—a fact which to a large extent determined the form and contents of their works.

(ii) *Other topics which in modern times belong to international law.*

Mediæval writers never cease, as Nys points out, to teach that war is an abnormal, peace the normal condition.[4] But naturally in early days the law finds much more to say about the former than the latter. Its great object is to realize its theory that peace is indeed the normal condition of things, and therefore it concentrates its efforts upon the rules for shortening, limiting, and regulating war. It is not until peace has become more normal than it ever was over the greater part of Europe in the Middle Ages, that the group of topics which modern international lawyers deal with under the title of Peace begins to emerge with any distinctness. In the Middle Ages we can do no more than point to the origins of one or two of these topics.

[1] Nys, op. cit. 197. [2] Ibid 197-200.

[3] They occur in the "temperaments" proposed by Grotius, but not in the strict law of war as stated by him, below 57.

[4] Op. cit. 264, "La guerre est l'état exceptionnel; la paix est l'état normal. Les auteurs médiévaux ne cessent de l'enseigner; chez tous, se rencontrent des maximes, transmises religieusement à travers les âges, où cette pensée est indiquée."



The view that the maintenance or restoration of peace is an ideal to be aimed at, occasionally bore some fruit in attempts to find other solutions for disputes than war. When helped by the power of the nascent state it did much to regulate and suppress private war;[1] and it sometimes had some effect in shortening wars between peoples. The pope sometimes used his influence to negotiate a treaty of peace. The treaty of Bretigny (1360) was largely due to him; the pope and the Council of Basle helped to conclude the treaty of Arras (1435); and occasionally other rulers intervened.[2] Sometimes attempts were made to settle disputes by a conference; but mutual distrust—justified by such events as the assassination of the Duke of Burgundy at Montereau—prevented this method from being much used.[3] Arbitration appears more frequently. Henry II. in 1177 arbitrated between the kings of Castile and Navarre;[4] Louis IX. of France in 1264 arbitrated between Henry III. and his barons; and Edward I. in 1291 arbitrated between the thirteen competitors to the throne of Scotland. And there are a few other instances during the fourteenth and fifteenth centuries.[5] Both in treaties of peace and in arbitrations the influence which Roman law has had in promoting the idea that the relations between peoples should be ruled by law is apparent. The forms of treaties, the sanctions attempted to be imposed to secure their observance, and the procedure in cases submitted to arbitration, show that the rules and ideas in common use to regulate the relations of private individuals were applied to regulate the relations of rulers and peoples.[6] It is clear that the use of these forms and conceptions has contributed powerfully to promote the idea that these relations ought to be regulated by law, and to cement the connection between this law and the civil law.

Further, the Middle Ages recognized that a state injured by another, might, without going to war, remedy its wrong by self-help. It might allow either all its subjects or such of its subjects

[1] On this subject see Nys, op. cit. chap. v. In particular the rule which the jurists laid down for private war, that there must always be a *diffidatio*, was somewhat easily extended to wars between states in the form of a rule that a formal declaration of war was necessary; the rule is strongly upheld by Gentili as a rule of the jus gentium ordained of God, though by that time it was falling into disuse; it was a rule which squared well with the view that war should only be used as a last resort to recover one's rights, see Nys, op. cit. 176-177.

[2] Ibid 266-269.

[3] Comines, Bk. II. c. 8, said, "Quand deux grands princes s'entrevoyent pour cuider appaiser differends, telle venue est plus dommageable que profitable," cited Nys, op. cit. 51.

[4] Vol. i 40. [5] Nys, op. cit. 53-54. [6] Ibid 269.

as had been injured, to exact reprisals from the subjects of the state which had inflicted the injury. The theory which underlies the institution of reprisals is the theory universally held in the Middle Ages that that which is due from a community is due from each of its members.[1] The breadth of the theory accounts for the wide use of reprisals in many different connections. We shall see that in Italy the interests of commerce led to their regulation and that that regulation is one of the roots of that department of private international law which regulates the legal consequences of foreign judgments.[2] Elsewhere they continued to be used extensively all through the Middle Ages and later, till the growth of the power of the state and the interests of commerce led to their regulation, limitation, and finally to their disuse. The founders of modern international law turned against them. Gentili called the law relating to them "most hateful";[3] and Grotius, though he does not deny their legality[4] or even their usefulness,[5] cites with approval the Roman theory—wholly opposed to the mediæval theory on which reprisals rested—that "Si quid universitati debetur, singulis non debetur, nec quod debet universitas singuli debent."[6] The law and custom of reprisals may have helped indirectly to forward the view that neutral individuals who offend the rules of international law may be punished by a belligerent state. Otherwise they have left hardly any trace in our modern law.

The influence of commercial interests in first limiting and then abolishing the right of reprisals shows us the source from which we may expect to find some development of the rules for the regulation of the peaceful intercourse of different nations. In the relations of the great trading centres of Italy and South Western Europe many of the doctrines of our modern international law originated. Just as we find in them some of the germs of the law of Neutrality,[7] and some regulation of Reprisals,[8] so we find the beginnings of the conception of the Balance of Power,[9] the institution of permanent embassies, and the consequent

[1] Nys, op. cit. 63. [2] Below 73-75, 98.

[3] "Dico esse odiosissimum hoc jus literarum markæ, quod merito divinissimus noster rex abominatur: per quod geretur latrocinium verius quam bellum: contra inermes et innoxios mercatores et alios ab aciebus longe positos," Lansdowne MSS. vol. 139, cited Nys, op. cit. 77.

[4] De Jure Belli et Pacis iii 2. 2, "Est igitur hoc inter jura illa quæ Justinianus ait usu exigente et humanis necessitatibus agentibus humanis constituta. Non autem ita hoc naturæ repugnat, ut non more et tacito consensu induci potuerit."

[5] "Alioqui magna daretur injuriis faciendis licentia, cum bona imperantium sæpe non tam facile possint in manus venire, quam privatorum qui plures sunt," ibid.

[6] Ibid iii 2. 1; the custom was practically obsolete by the end of the seventeenth century, Nys, op. cit. 77.

[7] Above 35. [8] Below 73-75.

[9] Nys, op. cit. 167-168, "Cinq grands Etats—Florence, Naples, Milan, le patrimoine de saint Pierre, Venise, etablissent un systeme de balance politique."



development of the art of diplomacy.[1] Many institutions which have played a large part in the making of modern international law could not arise till Western Europe had ceased to be one Holy Roman Empire, and had come to be a collection of territorial states. But the fact that Italy had anticipated this new organization sometime before the Reformation finally broke up the theoretical basis upon which the Holy Roman Empire rested, and the fact that Italy was more highly civilized than the rest of Europe, caused the Italian ideas to influence the growth of modern international law in much the same way as they influenced the growth of modern commercial and maritime law.[2] They were a useful model when, in the sixteenth century, mediæval ideas as to international relations required to be modified to suit the needs of independent territorial states.

### *The Necessities of the Territorial State*

I have already said something of the new political ideas which came with the rise of the territorial state.[3] We have seen that this new political phenomenon was accompanied by large changes in men's religious and intellectual outlook, and by a great enlargement of the boundaries of the known world. All these changes affected the relations of the various states of Europe, and added large new chapters to the laws and customs which regulated them. Here I shall, in the first place, indicate briefly the nature of some of these problems, and, in the second place, give some concrete instances of the manner in which some of them were solved by English statesmen and lawyers. This history will show us that it was the actual facts of the political life of Europe which led the lawyers of many countries to perceive that a new branch of law had arisen, and to endeavour, by a combination of mediæval theories and modern practice, to set it forth in systematic form.

(i) *The nature of the new problems.*

Of these new problems I shall only indicate briefly a few of the most important.

In the Middle Ages, when embassies were few and temporary, when the position of the nascent territorial state was not fully appreciated, the positions of a foreign sovereign and an ambassador were by no means clearly defined. We find a sovereign exercising acts of jurisdiction outside his own country—e.g. Richard I. hanged thieves on his way to Palestine, and Edward I., while staying at Paris, was allowed to exercise jurisdiction over a thief caught in his *hotel*.[4] On the other hand, acts of hostility were committed

[1] Nys, op. cit. 297. [2] Below 63-65.

[3] Vol. iv 190-217. [4] Walker, op. cit. 114.

against foreign sovereigns by their personal enemies, though no state of war existed—e.g. Richard I. was seized by Leopold of Austria and imprisoned on his way home from Palestine; and Henry IV. detained Prince James of Scotland in 1405.[1] The ideas, firstly, that the person of the sovereign is always sacred, and, secondly, that the jurisdiction of a sovereign within his own dominions is exclusive,[2] are at the root of the modern law. The foreign sovereign is immune from all interference by legal process or otherwise, but he can exercise no active functions outside his own territory. Similarly the universal prevalence of permanent embassies in the sixteenth century made it necessary to go beyond the vague phrases about the sanctity of the ambassador's person which had passed current in the Middle Ages, and to define his position in relation to the law of the country to which he was accredited. It was only gradually that the extent of his immunity from the process and jurisdiction of that country's courts was defined by the help of the ideas, firstly, that he represents the person of his sovereign, and secondly that, by a legal fiction, he, his dwelling-place, and his suite, are regarded as being outside the territory of the state to which they are accredited.[3]

These permanent embassies, which gave rise to the modern law as to the position of an ambassador, also gave rise to the diplomatic organization of modern times. The Italian cities, and especially Venice, pointed the way to the organization of a regular "corps diplomatique";[4] and the reports of these Venetian ambassadors are one of the most important sources of modern European history. Thus, as Nys has said, "Italy introduced the civilized world to international life."[5] Gradually diplomacy became a separate art, and the profession of the diplomatist a separate, sometimes almost a hereditary, profession.[6] Questions of precedence as between the ambassadors of different princes, and the gradations of rank between different classes of diplomatic agents,[7] gave rise to frequent disputes, to a series of monographs

[1] Walker, op. cit. 114. [2] Below 45, 49.

[3] Below 45-46; "Deux fictions, celle de la représentation du monarque par l'ambassadeur et celle de l'exterritorialité du ministre public contribuent à une exagération des privilèges des ministres publics, exagération qui trouve peut-être une justification historique dans la considération que l'imperfection des autorités locales necessitait une solide protection contre les désordres populaires ou contre les caprices du despotisme," Nys, op. cit. 341.

[4] See ibid 297-312, for an account of the Venetian organization; ibid 316-325 for an account of the beginnings of a similar organization in the principal countries of Western Europe.

[5] Ibid 313.

[6] "On remarque que, dans certains pays monarchiques, la carrière diplomatique devient l'apanage de quelques grandes familles. Il n'y a d'exclusion pour aucun talent, mais on voit de véritables dynasties se transmettre de père en fils l'art de négocier," ibid 325.

[7] Walker, op. cit. 174-176.



on ambassadors,[1] and to long chapters in modern books on international law. We may remember that at Oxford the full title of the Chichele professor of international law is professor of international law and diplomacy.

The rise of this new art is a sign that these modern territorial states, in spite of their independence and their sovereignty, were yet members of one family, and needed some machinery for the regulation of their common interests. The nature of some of these common interests has changed from age to age. In earlier days, family and dynastic relationships played a great part. In our own days the discoveries of physical science, by drawing together the most distant parts of the world, have immensely increased the number of these common interests. But two of the most permanent and most important of these interests have been the maintenance of the balance of power, and the regulation of foreign trade. Both in this period began to influence international relations, and therefore to give rise to further additions to international law.

The idea of maintaining a balance of power, will necessarily emerge whenever there exist together several neighbouring and independent states. In ancient Greece and in mediæval Italy wars and alliances were made to prevent the predominance of some one of these states. And, in the sixteenth century, the influence of this idea soon made itself felt throughout Western Europe. The foreign policy of Wolsey was, as we have seen, inspired by this idea,[2] and the foreign policy of the early part of Elizabeth's reign was determined to a large extent by her knowledge that the maintenance of the balance of power would practically compel Spain to take England's side against France.[3] The projected alliances and marriage treaties, the arrangements for war and negotiations for peace, either for the purpose of aggrandisement, or to prevent the aggrandisement of some other state, kept the sixteenth-century diplomatist busy, and helped to make the modern law which centres round the ambassador and his activities.

We have seen that the commercial policy of England was based upon the idea of furthering the maintenance and increase of the power of the state;[4] and the same idea inspired the commercial policy of other European states. But these ideas necessarily led to the making of commercial treaties such as the Intercursus Magnus made by Henry VII. in 1496, and the

[1] For some of these books see Nys, op. cit. 345-352, 356-361; in 1634 Sir Thomas Roe wrote a memorandum on the necessity for giving Englishmen who had served as ambassadors a better rank in the table of precedence, S.P. Dom. 1634-1635, 354, cclxxviii 44.

[2] Vol. iv 33. [3] Ibid 44-45. [4] Ibid 315-319.

Intercursus Malus in 1506. Similarly we have treaties between England and Flanders as to currency;[1] and from 1535 we have a series of capitulations which regulated commercial intercourse with the Turks.[2]

It was commercial considerations that led to those voyages of discovery which brought India and the East Indies into direct communication by sea with Western Europe, and made known both the New World across the Atlantic, and, beyond that New World, the new Pacific ocean. And these discoveries naturally raised many new problems for lawyers and diplomatists. We have already seen that the treatment by the Spaniards of the Indians aroused a keen discussion as to the justice of making war against them, which is at the root of much of our modern laws of war;[3] and that the admission that the Indians had some legal rights, paved the way for the enlargement of the sphere of international law beyond the circle of Christian states.[4] Besides these questions, these discoveries raised the question of the title of a state to newly discovered country by occupation. Could a state acquire such country if already occupied by infidels? Some held it could, and reliance was placed on the supposed power of the pope to dispose of all islands by virtue of Constantine's Donation.[5] Others held that infidels could hold property, and that therefore no state could take their land unless they refused to allow the discoverers to sojourn there, to share with them those things which by the jus gentium and general custom are common to all, or to trade.[6] In practice the different European nations took and settled upon as much of the New World as they could, and used their colonies simply to promote the commercial interests of the mother country. Papal bulls were naturally not regarded by Protestant countries; and in the seventeenth century the modern view, that the question of the title of the different countries to these possessions depended upon deductions drawn from the Roman law of *occupatio*, was beginning to prevail.[7]

Another question raised by the discoveries was the freedom of the sea.[8] In the Middle Ages claims had been made by

[1] Nys, op. cit. 288-291. [2] Ibid 293-294.
[3] Above 32-33. [4] Above 32.
[5] Nys, op. cit. 369, 370; below 47.
[6] This was the view of Vitoria, see Walker, op. cit. 220-224.
[7] See a discussion in 1613 whether Englishmen or Dutchmen had first discovered and occupied Greenland, upon which the right to fish for whale was thought to turn, Acts of the Privy Council (1613-1614) 322-324; cf. Hall, International Law (6th ed.) 107-114; as is pointed out, ibid 144-145, the proof demanded of effective *occupatio* is becoming more stringent as the area of possible occupation has become more limited.
[8] On the whole subject see Nys, op. cit. chap. xvi.



different countries to the control of certain seas bordering upon their states. Venice claimed to impose a tax upon ships which entered the Adriatic.[1] Genoa and Pisa claimed dominion over the Ligurian and Tyrrhenian seas.[2] England, certainly from the beginning of the fourteenth century, had claimed jurisdiction over the four seas.[3] Still larger claims were made by the Portuguese and Spaniards. The former claimed to have the exclusive right to the seas round South Africa and the East Indies, the latter to the seas round America. It was the Portuguese claims which gave rise to Grotius' famous work upon the *Mare Liberum*;[4] and this in its turn called forth, as we have seen, three replies by Englishmen—Borough's work upon the Sovereignty of the British Seas,[5] Welwod's work *De Dominio Maris*,[6] and the more famous work of Selden—the *Mare Clausum*.[7]

The increase in the number and permanence of the peaceful relations between states, the growth of a permanent machinery for the discussion of their differences, and the consequent evolution of a number of legal rules as to the working of this machinery and as to the principles applicable to settle these differences, naturally tended to bring into prominence the department of International law which concerns Peace. It became clear that the importance of the law which regulated the peaceful relations of states was as great as the importance of the law which regulated their relations in time of war. But this in its turn tended to give rise to an altogether new department in International law—the department of Neutrality. In the seventeenth century it gradually became clear that, if war was raging between any two states, those states which took no part in the war had peculiar rights against, and owed peculiar duties to, the states at war with one another.

The status of Neutrality was unknown in the Middle Ages, and was ill-defined in the sixteenth century.[8] Even in Grotius' work it takes no large place. In fact it was not till the latter part of the seventeenth century that the leading principles of the modern law began to be ascertained. The reason for its slow growth must probably be sought in the disturbing influence of

[1] Nys, op. cit. 379. [2] Ibid 380; Hall, International Law 140-142.
[3] A gloss on Bracton's text, printed by Maitland from the Cambridge MS. dd. vii 60, which comes from the end of the reign of Edward I. or the beginning of the reign of Edward II., runs as follows:—"Et nota de prima parte quod in Anglia minus curatur de jure naturali quam in aliqua regione de mundo quia Rex Angliæ vocatur dominus marium propter potestatem suam quam habet in aquis," Bracton and Azo (S.S.) 125; for the Fasciculus de superioritate maris of Edward III.'s reign in which this claim is made, see vol. i 544; below 47.
[4] Nys, op. cit. 382-383.
[5] Above 10. [6] Above 10.
[7] Above 10-11; below 47. [8] Below 47-49.

the wars of religion. The foreign policy of the state was often not in accord with the religious views of large sections of its subjects; and this made for interferences in the domestic dissensions and the foreign wars of other states with which there was nominally peace. Englishmen in the reign of James I. were ready enough to take a hand in the Thirty Years War, and soldiers were enlisted in the Protestant interest.[1] Again, states were sometimes nominally at peace, but each was ready to assist the enemies of the other. This was the position of England and Spain right down to 1588. It was not till the wars of religion were over that differences between states came to be based solely upon divergent national interests. It was not till then that the states of Peace, War, and Neutrality could clearly emerge and give rise to distinct sets of rules.

In these various ways the necessities of the territorial state had set a number of new problems to statesmen and lawyers. A few concrete instances, taken from English history, will show us that the solution of these problems was giving rise to a number of new applications of old rules, to many entirely new rules, and to some new theories and speculations.

(ii) *Some concrete instances from English history of the problems set by the necessities of the territorial state.*

We have seen that the maintenance of the study of the civil law was grounded mainly upon the necessity of educating men who could advise the government in international difficulties.[2] Though these difficulties occasionally came before the common lawyers when they touched on English law,[3] they were generally matters which concerned the Council, and depended upon the rules which, all over Europe, the civilians were applying to their solution. The manner in which the Council used the advice of the civilians to help them in these difficulties has been so clearly described by Nys that I shall copy his words.[4] He says: "A perusal of the volumes of the Calendar of State Papers establishes that, before the period when international law was greatly developed, the English government was convinced of the necessity of juridical study and advice upon international questions; we can see that it knew perfectly how to utilize the talents of its agents. Among the memorials which they drew up, some take the form of truly academic dissertations, as for example the reply of Valentine Dale on the subject of ancient and modern wars begun illegally and without just cause;[5] others are quite technical,

[1] Below 49. [2] Vol. iv 233.
[3] For some illustrations see Coke, Fourth Instit. c. 26; below 49-50, 136 n. 10, 144, 146-147.
[4] Nys, op. cit. 354. [5] S.P. Dom., 1581-1590, 257, clxxxi 18.



such as the opinion as to those who assist pirates;[1] others again have an intense practical bearing on the facts of the day, as the examination which the same learned civilian made, on the instructions of Burghley, of the book in which Don Antonio had maintained his rights to the throne of Portugal, which were disputed by Philip II. In his reply to Burghley Dale adds a note of the treatise of Bartolus *De Dignitatibus*, on the subject of the position of a prince outside his own dominions."[2]

The last-mentioned subject was a matter of very practical importance to the English government while Mary Queen of Scots was in England. As against the legality of her detention by Elizabeth she contended that a foreign sovereign was wholly immune from any territorial jurisdiction;[3] and this is the view which has prevailed.[4] Elizabeth, on the other hand, contended that she was within her right in detaining her in custody as this step was necessary for her own safety.[5] And later, she defended her right to try her on the undoubtedly valid grounds that, having been deposed, she was no longer a sovereign; and that, being in England, she was subject to English law.[6]

The position of an ambassador and his suite gave rise to many debatable questions. According to the views of the civilians consulted in the case of the Bishop of Ross, an ambassador who attempted to raise rebellion forfeited his privileges;[7] and Coke and others seem to have thought that the commission by an ambassador of "any crime which is contra jus gentium as treason felony adultery" entailed forfeiture of his privileges.[8] But the opinion now established that an ambassador in such a case should be simply ordered to leave the country was advocated by Gentili and Hotman in the case of Mendoza, and was followed by the government.[9] Similarly it would appear from

[1] British Museum Harl. MSS. 168; cf. also an opinion of Sir H. Marten given to the House of Lords as to the right to take enemy goods in English ships, Hist. MSS. Com. 4th Rep. App. Pt. I. 88.
[2] S.P. Dom. 1581-1590, 63, cliv 63. [3] Walker, op. cit. 170, 171.
[4] But apparently in the seventeenth century the common law courts were not quite alive to all the consequences of this immunity; Selden says, Table Talk (Ed. Reynolds) 99-100, "the king of Spain was outlawed in Westminster Hall, I being of counsel against him"; and the same uncertainty prevailed in the case of the ambassador, below 46.
[5] Walker, op. cit. 171.
[6] "That the English which in England did acknowledge the souvraigne authority of Queene Elizabeth only, could not acknowledge two supreme, free, and absolute princes in England at once; or any other whomsoever to be equall unto her in England as long as she lived. Neither indeed did they see, how the Queene of Scottes, and her Sonne at that daie reigning, could bee holden both at one time to bee supreme and Absolute Princes, that no man was ignorant of that saying of the lawyers, A man offending in another's territory, and there found, is punished in the place of his offence, without regard of his dignity, honor, or privilege," Camden, Elizabeth s.a. 1586, cited Walker, op. cit. 172.
[7] Ibid 176-179. [8] Fourth Instit. 153.
[9] Walker, op. cit. 180-181; Holland, Studies in International Law 10.

Coke, and also from writers on international law, that the immunity of the ambassador from civil suits was by no means fully established.[1] In 1590-1591 a Dutch envoy, who claimed to be "a public person," complained to the Council that he had been arrested at the suit of Gerrard de Malynes; and the Council referred the matter to Drs. Aubrey and Cæsar for enquiry.[2] The privileges belonging to the Ambsssador's residence were sometimes, according to our modern ideas, unduly curtailed. Thus Philip II. once denied the English ambassador the right to use the service of the Church of England in his house.[3] Sometimes they were unduly extended—as when Sully tried and condemned to death a member of his suite who had killed an Englishman in a brawl.[4] That a member of the ambassador's suite was, by English law, amenable to the local criminal jurisdiction was settled in 1654 in the case of Don Pantaleone Sa who, though the brother and a member of the suite of the Portuguese ambassador, was tried and executed for murder.[5]

The number of questions which arose in this period as to the rights and privileges of ambassadors illustrates the important place which these permanent embassies were taking in the political life of the period. Their presence was in fact very necessary to adjust the minor differences which were always arising out of the constant intercourse between the various states of Europe. There are very many instances in the Council records in which the ambassador of some foreign power brought to the notice of the government some case of the ill-treatment or oppression of a subject of his own state;[6] and conversely, there are many cases in which representations were made to the ambassador of a foreign power by whom an English subject had been oppressed.[7] Very many of these complaints were made

[1] Coke, Fourth Instit. 153, says, "And so of contracts that be good jure gentium he must answer here"; Zouche, Juris et Judicii Fecialis Explicatio, Pt. 2 § 4, says, "De omni contractu quem tempore Legationis iniit Legatum judicium subire debere censet," and he vouches Gentili; cf. Nys, op. cit. 341; but Grotius, De Jure Belli et Pacis, Bk. ii 18. 9, took the opposite view, which has prevailed; for the analogous case of the foreign sovereign see above 45 n. 4.

[2] Dasent xx 310.

[3] Walker, op. cit. 181-182.

[4] Ibid 183; Grotius said, op. cit. Bk. ii 18. 8, "Ipse autem legatus an jurisdictionem habeat in familiam suam . . . ex concessione pendet ejus apud quem agit. Illud enim juris gentium non est."

[5] Pitt-Cobbet, Leading Cases on International Law (2nd ed.) 114; Grotius had said, op. cit. Bk. ii 18. 8, "Si quid comites gravius deliquerint postulari a legato poterit ut eos dedat."

[6] Nicolas vii 47-48 (1540); Dasent i 162, 220 (1545); ii 373 (1549-1550); iv 178 (1552), 289 (1553); vii 357 (1570); xvi 415 (1588).

[7] Nicolas vii 18, 86, 131 (1540); 308-309, 318 (1541); Dasent i 161, 275 (1545); iv 390 (1553-1554); v 98 (1554-1555); vii 348 (1567); 392 (1570); xi 343, 347 (1579); 371 (1579-1580).



by English and foreign merchants. Sometimes they arose out of the grant of reprisals, which was still a method used to force a foreign state to give redress.[1] But it is clear that the newer method of diplomatic representation, and the action taken in consequence of it, was doing much to render unnecessary this barbarous method of obtaining satisfaction.

In England, as abroad, it was the growth of foreign trade which gave to all questions connected with sovereignty of the seas an international importance. On the one hand, England resisted the claims of the Spaniard to prevent all other nations from trading in the New World, and insisted that they had no right to countries which they had not substantially occupied.[2] On the other hand, she rigidly asserted her rights to the sovereignty of the four British seas. The omission of a foreign ship to strike his flag and lower his topsail was regarded as an act which justified firing on the offender—as Philip II. found when he came to marry Queen Mary.[3] The Dutch were the supporters of the *Mare Liberum*. Their refusal at the beginning of the seventeenth century to recognize the English claims, and, in particular, their refusal to obey the royal proclamations which attempted to confine the right of fishing off the British coasts to British subjects, led to much negotiation and to threats of war.[4]

Similarly it was the importance of the interests of traders which led to the beginnings of a definite law of Neutrality. And, this being the case, it is only natural that that part of the law which is concerned with the relations of the neutral individual to the belligerent state was the first to attain clear definition. We have seen that in 1640 Sir H. Marten gave an opinion to the house of Lords as to the right to capture enemy goods in English ships.[5] The liability of a neutral ship for the carriage of contraband[6] or the analogues of contraband,[7] the right of the crown to the delinquent ship and goods,[8] the immunity of a neutral ships carrying goods belonging to neutrals other than

[1] Dasent i 107, 108, 112 (1543); viii 4, 5 (1570-1571); above 38.

[2] See Walker, op. cit. 161, citing Camden, Elizabeth ii 116.

[3] Ibid 163-164.

[4] Ibid 167-169; Welwod in his book De Dominio Maris (1615) distinguished between the distinct claims to freedom of navigation and freedom of fishing, Nys, Rev. de Droit International xvii 77.

[5] Above 45 n. 1.

[6] Dasent xv 339 (1587-1588); xvii 398-401 (1589); xviii 8, 17, 19, 27 (1589). For some discussions in 1656 with the Swedish ambassador as to what goods could be declared contraband, see Whitelocke, Memorials iv 243-246.

[7] Dasent vi 352 (1558)—letters between France and Scotland; the claim to stop the ship was not insisted on, as it was said to be Danish.

[8] Ibid xxi 155 (1591).

contraband,[1] were matters which were frequently before the Council. A letter of the Council, in 1589,[2] to the commissioners for dealing with ships taken on the coast of Portugal, shows that some principles as to the law of contraband were beginning to emerge. The goods in these ships, say the Council, "we conceive to be of three kindes; the first being of the nature of munition and vyctuell are by her Majestie's order to be arrested in respect bothe of the unlawfullnes of the acte to relieve her Majestie's enemies with suche warlyke furnitures, as also for the admonition and prohibition made to the inhabitauntes of the said Townes aforehand not to convey into the contreys and dominions of the Spanish Kinge . . . anie comodytes of those kindes whereby her enemies might be armed and strengthened to invade her Realmes and Dominiones . . . The second being meere merchaundizes, and of suche nature as may nether feede nor arme her said enemies, her Majestie is pleased to forbeare to staye them, and to leave them to the use of the proprietaries . . . The thirde and last kinde is suche as althoughe yt be meere merchandize, yet in case the proprieties thereof shalbe found to appertaine to any Spagniard or Portuegall, her pleasure is that yt be held as lawfull prize,[3] to be taken and employed to the use of her Majestie, and of such as have adventured in the late voyage."

But the part of the law of Neutrality which is concerned with the rights and duties of the neutral state to the belligerent state was still very obscure. It is true that the condition of Neutrality was recognized in fact. In 1587 some French ships had been arrested at one of the ports of the Channel Isles. The local authorities claimed that the Isles had always been regarded as neutral ground. The government were inclined to consent to the policy "of continuynge the said Isles in a kind of neutrallitie to serve for a place of common vent for both the said Realmes"; and the ships were ordered to be released if the French consented to follow a similar course.[4] It is true also that an effort was sometimes made to give effect to neutral rights and duties. In 1604 James I. forbade all belligerent violence in the

[1] Dasent i 230, 259 (1545); xvi 415 (1588); xvii 398-401 (1589); xviii 19 (1589).

[2] Ibid xviii 29-30.

[3] Free ships did not make free goods; and in 1656 the government expressly declined to admit this principle, Whitelocke Memorials iv 243.

[4] Dasent xv 128-9 (1587)—the usage was found to be that, "All merchantes strangers had from time to time been receaved within the Isles of Jersey and Garnesy in safetie, free from arrestes both of their lives, shippes and goodes; and touchinge the expediencie, for that the publick benefit that both the Crownes of England and Fraunce did receave in time of hostillitie or unkindness by continuying the said Isles in a kind of Neutrallitie to serve for a place of common vent for both the said Realmes was sufficientlie knowne, it seemed great reason that (such consideracions continuinge still) their priviledges grounded uppon the same should likewise be still mainteined and continued."



British seas;[1] in 1572, 1573, and 1577 Elizabeth prohibited the levy of troops for service in countries with which England was at peace;[2] and in 1605 the court of King's Bench and the civilians differed on the question whether property taken by a Dutchman from a Spaniard and brought to England could be claimed by the Spaniard.[3] But practice was not in accord with theory. In 1605 the Dutch and Spanish fleets fought in Dover harbour;[4] and though, "Englishmen cried shame when Charles I. lent men-of-war to his French brother-in-law for the subjection of the Huguenots, they thought it no harm that regiment after regiment of their fellow-countrymen was enlisted by the royal authority, or at least by the royal permission, for the service of the Dutch against the Spaniards, with whom England was nominally at peace; that Elizabeth received Havre as the price of assistance granted to the revolted French Protestants; or that 6000 Scots under the marquis of Hamilton fought for German Protestantism against the Emperor."[5] Probably it is the unsatisfactory state of international practice that accounts for the fact that we find a good deal more information about Neutrality in the actual diplomatic intercourse of the period than in the books.

The growth of the idea of the sovereignty of the territorial state over all persons within its borders gradually settled the question of the liability of a foreigner for breaches of the local criminal law. He was liable because he owed a temporary allegiance to the government of the country in which he was resident.[6] On the other hand, it was generally held in England[7] and other European countries[8] that he could not be made liable to the local criminal law for offences committed abroad. Nor was there, apart from special treaty, any obligation to extradite him. Certain earlier treaties provided that the contracting parties should not give shelter to the enemies of the other;[9] but as Nys has said, they contemplated expulsion as a police measure, and not the beginning of a criminal proceeding.[10] It is very rarely

[1] Walker, op. cit. 201; above 43.

[2] Dasent viii 77, 115; ix 382-383; above 44.

[3] Coke, Fourth Instit. 154; Nys, Les Manuscrits de Sir Julius Cæsar, Rev. de Droit International xix, 463-465.

[4] Walker, op. cit. 201-202.

[5] Ibid 196.

[6] It was recognized in Elizabeth's reign, above 45 n. 6; and in Calvin's Case (1609) 7 Co. Rep. 6b; it was decided in 1662, Kelyng, at p. 38. But in 1545 a Spanish soldier who had committed murder in England was handed over to his captain for punishment, Dasent i 170.

[7] See the preamble to 35 Henry VIII. c. 2, reciting that it is doubtful whether treason committed abroad can be punished in England.

[8] Nys, op. cit. 274.

[9] Ibid 274-275.

[10] "Il s'agit de l'exercise d'un droit de police, non d'un commencement d'action judiciaire," ibid 274.

that these treaties had reference to any other than political crimes.[1] But there are instances of applications for extradition made by foreign sovereigns which were acceded to.[2] The idea was growing up that such criminals should not go unpunished; and Grotius maintained that a state should either give up the criminal or punish him.[3] This view was acted on by the States-General of the Netherlands when they issued an order for the arrest of the regicides who had taken refuge on their territory.[4] According to English law, a natural born subject could not get rid of the tie of allegiance.[5] Therefore if such a subject had broken the law of England and was brought within the jurisdiction of the English courts, he could be tried and punished. This was settled in the case of Dr. Story who was kidnapped in the Netherlands, brought to England, and tried and executed for treason. His case is another illustration of the manner in which religious fanaticism produced irregularities in international practice. It is clear that his capture was a gross violation of the rights of the King of Spain.[6]

These instances of international discussions and controversies show that, in England as elsewhere, a new branch of law had arisen. It was obviously necessary that it should receive some systematic treatment; and many jurists in different countries came forward to supply this need. In the books of the English writers on this subject we can find some of the earliest statements of modern international law. With some of these books I must now deal.

### *The Earliest English Writers on International Law*

The characteristic feature of modern international law is that it is the law which regulates the relations *between nations*. It is *jus inter gentes*. It is exactly this characteristic feature which emerged clearly in the sixteenth century. The earliest writer

[1] Nys can only cite one, concluded between Charles V. and the count of Savoy, ibid 275.

[2] Nicolas vii 147 (1541); Dasent iii 407 (1551); Acts of the Privy Council (1613-1614), 421—examinations ordered in connection with a fugitive criminal from France; see S.P. Dom. 1640-1641, 378, cccclxxv 105 for some notes as to the precedents on this matter.

[3] De Jure Belli et Pacis, Bk. ii 21. 4, "Cum vero non soleant civitates permittere ut civitas altera armata inter fines suos pœnæ expetendæ nomine veniat, neque id expediat, sequitur civitas apud quam degit qui culpæ est compertus, alterum facere debeat, aut ut ipsa interpellata pro merito puniat nocentem, aut ut eum permittat arbitrio interpellantis. Hoc enim illud est dedere, quod in historiis sæpissime occurrit."

[4] Nys, op. cit. 276-277.

[5] Calvin's Case (1607), 7 Co. Rep. 25a; contrary to the opinion of Zouche, Juris et Judicii Fecialis, Pt. II. § 2. 12; he also held the generally received view that a man could not at the same time be the citizen of two states, ibid Pt. II. § 2. 13.

[6] Walker, op. cit. 159 n. 1.



to emphasize it was Francis de Vitoria—"Quod naturalis ratio inter omnes gentes constituit vocatur jus gentium."[1] But the idea was too obvious to be missed; and it appears in other writers. Hooker brought it out with great clearness;[2] and, though it was not emphasized, it was recognized by Grotius,[3] and was adopted and elaborated by Zouche.[4] From him it has passed to all successive writers who treat of or touch upon the subject.[5]

The recognition in the sixteenth century of this distinguishing characteristic of international law is typical of its growth. Among many nations the birth of this new body of law had gained recognition; and many lawyers before Grotius had begun to treat systematically of various parts of it. The English nation was not behind hand in this work. We have seen that the English civilians were always called upon to advise the government upon international questions;[6] and that some of them had begun to write treatises upon several topics connected with it.[7] Two of them—Alberico Gentili and Richard Zouche—have written books which have helped to make the modern law; and therefore of them and of their works I must say something.

We should naturally expect that the principles of this new body of law would take their modern shape in the writings of men who belonged to the reformed religion. It was easier for them to see eye to eye with the new political and intellectual conditions which had given them birth. And this is the case. For, although the writings of famous theologians and lawyers of the Spanish nation contributed to the formation of the modern law of war, it is in the writings of men who came from England and Holland that modern international law as a whole first took shape. A cardinal of the Roman Church complained that Grotius's book gave too little space to the prerogatives of the pope, and his book was placed upon the Index.[8]

[1] Nys, op. cit. 8; Les Fondateurs du Droit International, by various writers, 7, 329.

[2] "Besides that law which simply concerneth men as men, and that which belongeth unto them as they are men linked with others in some form of politic society, there is a third kind of law which toucheth all such several bodies politic, so far forth as one of them hath public commerce with another," Eccl. Pol. i 10 § 12, cited Pollock, Camb. Mod. Hist. xii 709; and cf. vol. iv 214.

[3] Above 27 n. 1.

[4] Juris et Judicii Fecialis sive Juris inter Gentes et Quæstionum de eodem explicatio, Pt. I. § 1, "Quod inter principes vel populos diversarum gentium communiter intercedit, cum ex hoc jure, uti refert etiam juris consultus (Gaius), gentes discretæ sunt, regna condita, commercia instituta, et denique bella introducta. Quod est posterioris generis, jus inter gentes, placet appellare, quod apud Romanos, speciali nomine Jus Feciale." It was Bentham who coined the modern term "International Law."

[5] See e.g. the definition of Hobbes, Leviathan (1st ed.) 185.

[6] Above 44-45.

[7] Above 9-11.

[8] Les Fondateurs du Droit International 144.

Alberico Gentili wrote before, and Richard Zouche wrote after Grotius. A comparison of their works will illustrate both the debt of international law to the school of English civilians, and the position of the man who by general consent has been rightly regarded as the founder of the modern law.

Alberico Gentili [1] was educated at the University of Perugia. It was a famous legal university, and could boast of having had Bartolus and Baldus among its pupils. It was natural therefore that Gentili should be an upholder of the Bartolists as against the school of the Renaissance jurists.[2] He took the degree of Doctor in 1572; and till 1579 followed the profession of the law. In 1579 he and his father, having become Protestants, left Italy and found a refuge at Camiola in Austria. But Gentili did not stay there long. In 1580 he came to England. He was brought to the notice of Leicester, the chancellor of Oxford University, and, through his influence, was incorporated doctor of civil law in that university. He taught for several colleges, the earliest of which was St. John's,[3] and produced many books. That he had gained considerable reputation is clear from the fact that in 1584 he and John Hotman were consulted by the government as to the proper course to pursue in the case of Mendoza, the Spanish ambassador, who had been implicated in the plots against Elizabeth. One of the results of the attention which he gave to this subject was the production of his book *De Legationibus*.[4] In 1586 he left England for Wittenberg; but in 1587 he was recalled to Oxford, and made Regius Professor of civil law. It was while he held this office that he published his most famous book—the *De Jure Belli*.[5] In 1605 he was employed as advocate to the Spanish embassy. At that time England was a neutral in the war which was still going on between Spain and the Netherlands. The results of his experience in that office were the *Advocationis Hispanicæ duo libri* which were published after his death. They are "a very important and interesting collection of notes of cases involving the rights of belligerents and neutrals."[6] Gentili died in London, June 19, 1608.

His work was appreciated by his contemporaries. Fulbecke described him as a man "who by his great industrie hathe quickened the deade bodie of the Civill law written by the aun-

[1] This account of Gentili is taken from Holland, Studies in International Law 1-39; cf. Les Fondateurs du Droit International 39-45; Phillipson, Journal Soc. Comp. Leg. xii 52-80.

[2] Vol. iv 239. [3] Holland, op. cit. 10 n. 1.

[4] For a summary of this work see Les Fondateurs du Droit International 69-74; Nys, op. cit. 350-352.

[5] Edited by Professor Holland in 1877, and published by the Clarendon Press; my references are to the pages of this edition.

[6] Holland, op. cit. 13.



cient Civilians, and hath in his learned labours expressed the Judgment of a great Statesman, the soundness of a deepe philosopher, and the skill of a cunning Civilian. Learning in him hath showed all her force, and he is admirable because he is absolute." [1] But for many years his name was almost forgotten with that of many another precursor of Grotius. Sir Thomas Holland has restored to his rightful place in the history of international law the work of the Oxford professor who was perhaps the earliest expositor of modern international law.

The three chief works of Gentili contain matter dealing with the three important divisions of international law. The *De Legationibus* naturally contains much about the relations of states in time of peace. The *Advocationis Hispanicæ duo libri* contain one or two important passages upon the law of neutrality.[2] His most important work is the *De Jure Belli*—and it was natural that it should be so. We have seen that it was this topic which had been the most amply treated by the earlier authorities.[3] It is this work upon which his historical importance mainly rests.[4]

The casuistical and theological writers of the sixteenth century could never entirely emancipate themselves from the theological, ethical, and political ideas which they found in the earlier writers. Gentili—an exile for the sake of religion—was wholly emancipated from these ideas. In his eyes, as in the eyes of most Protestants, the tie which bound the nations together was, not allegiance to the pope and a common set of theological dogmas, but the law of nature. This law, he considered, was to be found in that which the "major pars orbis" [5] agrees upon, and it may be defined as "particula divini juris quam Deus nobis post peccatum reliquam fecit." [6] Upon this basis, and with the help of the technical conceptions of the civil law, he adapted the speculations of his predecessors to modern needs, and explained the actual practice of modern states. He is above all things modern. The law which governs the relations between states is a matter for lawyers, and not for the philosopher,[7] or the theologian.[8] He does not hesitate to condemn private war;[9] and his definition of

[1] A direction or preparative to the study of the law, 26b.

[2] Holland, op. cit. 22; Les Fondateurs du Droit International 74-76.

[3] Above 9, 29-33.

[4] For a good summary see Les Fondateurs, etc. 48-74.

[5] Bk. i c. 1 p. 8. [6] Ibid p. 6.

[7] Ibid p. 1, "Scilicet nec moralis, nec politici munus Philosophi esse videtur, exponere jura, quæ cum hostibus quæ cum externis communia nobis sunt."

[8] Ibid c. 12 p. 55, "Silete theologi in munere alieno."

[9] Ibid c. 3 p. 19, "Privati porro homines, et populi subditi, et Principes inferiores non eam habet necessitatem unquam decurrendi ad judicium Martis: qui jus suum ir judicio apud superiorem persequi possunt."

war as "publicorum armorum justa contentio"[1] is better, according to modern ideas, than that of Grotius.[2] Similarly he condemns certain practices (such as reprisals)[3] which, being generally allowed, were not pronounced to be illegal by Grotius. It is modern events looked at in the light of the law of nature, and with the eyes of a trained civilian, on which he founds the law.[4] Thus he is the earliest writer of the historic or positive, as opposed to the philosophic school of international lawyers.[5] "Relying chiefly on facts and rules established by custom or treaties, he guards himself from stating absolute principles, and contents himself with indicating tendencies."[6] Here again he is more modern in his treatment of the subject than Grotius and many of his successors.

But international law was not as yet ripe for such a treatment. It was as yet a very new branch of law, the independent existence of which was as yet hardly recognized. Men's minds, being still influenced by the theological and philosophical moulds in which they had been shaped all through the Middle Ages, still demanded for all branches of knowledge a good stiff backing of a priori principles. Without the influence of such a backing no new branch of knowledge could win a hold over men's minds, nor could it be extended so easily by a process of logical deduction. This need a Protestant Bartolist lawyer was hardly the man to supply.[7] He had neither a systematic nor a philosophic mind. He never thought of co-ordinating his book on embassies with his book on war; and he did not elaborate the basis of principle upon which he constructed his law of war.[8] Thus he failed to become the founder of modern international law because his book lacked the inspiration which can only be communicated by work which both satisfies the intellectual taste of the age, and points the way to further progress along the lines prescribed by its intellectual conditions. Grotius succeeded where Gentili failed

[1] Bk. i c. 2 p. 10.

[2] De Jure Belli et Pacis, Bk. i r. 2, "Ita ut sit Bellum status per vim certantium."

[3] Above 38 n. 3.

[4] "Lui même rapporte de nombreux faits qui se sont passés au cours de XVIe siècle, ce qui a fait dire à Scholpis que le meilleur commentaire des événements historiques de ce siècle c'est l'oeuvre de Gentilis," Les Fondateurs du Droit International 84; Journal Soc. Comp. Leg. xii 59.

[5] Les Fondateurs du Droit International 37-38.

[6] Ibid 37.

[7] "Ses successeurs lui reprocheront aussi, non sans raison, de manquer d'idéalisme," ibid 86.

[8] "Alors que ses contemporains exposaient, *a priori*, les règles du droit déduites de la raison naturelle et de la sociabilité des peoples qui constituent une communanté et dependent ainsi les uns des autres, Gentilis au contraire voit dans ce droit le résultat d'un long accord des peuples, accord qui apparait par le long usage et que l'histoire rend manifeste. Il dresse ainsi en quelque sorte un Grand Coutumier du droit international," ibid 85; cf. Nys, Le droit Romain, le droit des Gens, et le college des docteurs en droit Civil 96-97.



because he had the philosophic gifts which Gentili lacked. These gifts guarded him from stating as law rules which went beyond the practices and observances of the nations, and thus enabled him both to put the ascertained law upon a firm footing, and to make suggestions for reforms in such a manner that they won a ready acceptance.[1]

A history of English law is not the place to enter into a detailed account of Grotius and his work. But since much international law is part of English law, and since Grotius has influenced the whole course of the development of that law, it is necessary to summarize very briefly the causes and nature of his influence.[2]

The reason why the publication in 1625 of the *De Jure Belli et Pacis* marks the beginning of modern international law is to be sought firstly in the character of Grotius's intellectual training, and secondly in the character of his mind.

*Grotius' intellectual training.*—(i) He was a trained lawyer. With him, as with Gentili, the concepts of the civil law supplied the cement which enabled him to bind together under recognized principles the phenomena of international relations. This is apparent if we look at his account of the manner in which sovereignty can be acquired or alienated,[3] or of the manner in which treaties ought to be interpreted.[4] (ii) He was a master of the scholastic method to which the lawyers of that age were accustomed. This leads him "to make an infinite number of divisions, and to examine successively under different points of view the questions of which he treats."[5] The characteristics which often make his book tedious to a modern reader helped to increase its authority among the readers of his own time. (iii) He was also a master of the humanist learning which the lawyers of the Renaissance had used to correct the errors of the school of the commentators. He could use the classical historians and the classical philosophers to supply him with instances, and to support his theories.[6] (iv) He was a Protestant. That meant that, like Gentili, he was emancipated from the older political and theological ideas, and was able to look fairly at the political and theological phenomena of his day.[7] And he was a more tolerant Protestant than Gentili.[8]

[1] Les Fondateurs du Droit International 89.

[2] I have made great use of Professor J. Basdevant's able account of Grotius in Les Fondateurs du Droit International 118-267; also of Mr. Walker's analysis and estimate of his book in his History of the Law of Nations i 278-337. Grotius's book was translated into English in 1654, Nys, Le droit Romain, le droit des Gens, etc. 89-90.

[3] De Jure Belli et Pacis, Bk. i c. 6.

[4] Ibid 16.

[5] Les Fondateurs du Droit International 218.

[6] Ibid 220.

[7] Walker, op. cit. 331.

[8] Gentili (op. cit. Bk. iii c. 19 pp. 384-387), though he approves of commercial treaties, or treaties by which the infidel is subjected to the Christian, and a few others, disapproves of all offensive alliances with the infidel either against infidels or a fortiori

He was prepared to extend the boundaries of international law beyond the circle of Christian states. Christian states indeed were more closely bound together by ties of kinship; but none the less the infidels had rights, and no human law forbade the formation of an alliance with them.[1]

*The character of his mind.*—Grotius had both a sympathetic and a constructive mind. He was capable of appreciating the strong points in the views of his predecessors; and his appreciation kept him within the circle of ideas which could be understood by his contemporaries. Most of his theories could be illustrated from older books; but he was able so to combine what he had borrowed that he gave to his borrowings a wholly new meaning.[2] Thus he based his theory of the law which governed the relations of states upon so skilful a combination of natural law, divine law, and established custom, that it won a universal acceptance. As Sir F. Pollock has said,[3] "Scholars and philosophers would for the most part accept the law of nature; divines, and especially Protestants (many of whom regarded natural law with suspicion), expected Scriptural warrant; public men would insist on being assured that the author who called for their attention was walking on the ground of practical affairs, and not merely setting up his own opinions as an universal standard." It was only a learned man with this kind of sympathetic and constructive mind who could succeed in establishing international law on a basis which "learned men would deem sound and men of the world would not think fantastic."[4]

A book written on these lines is the kind of book which makes history. It was sufficiently conservative to shock no established prejudices; and, at the same time, it was sufficiently modern to express a set of ideas which had long been present to

against Christians, relying on Old Testament Biblical history—"Ita maneo cum doctissimo nostri seculi theologo: qui negat cum infidelibus arma recte conjungi umquam" (p. 385); cf. Journal Soc. Comp. Leg. xii 68, 69; Nys, Le droit Romain, le droit du Gens, etc. 96.

[1] Grotius, De Jure Belli et Pacis, Bk. ii 15. 8, "De foederibus frequens est questio, licite-ne ineantur cum his qui a vera religione alieni sunt; quæ res in jure naturæ dubitationem non habet. Nam id jus ita omnibus hominibus commune est, ut religionis discrimen non admittat. Sed de jure divino quæritur ex quo hanc quæstionem tractant, non theologi tantum, sed et juris consultorum non-nulli."

[2] Les Fondateurs du Droit International 264-265, "Son mérite propre est d'avoir fait le synthèse des éléments fournis par ses précurseurs. On a pu dire que le De Jure est comme la dernière forme des travaux antérieurs. Ceux ci peuvent disparaître: le traité de Grotius sauvé, ou n'aura presque rien perdu. Que si l'on prétend qu'il restérait bien peu à Grotius si ses prédécesseurs s'avisaient de lui réclamer ce qu'il leur doit, cela nous touche peu. . . . Grotius s'est vraiement approprié ce qu'il a tiré de ses prédécesseurs. . . Son oeuvre a donné a des solutions déjà présentées antérieurement une forme nouvelle en les renfermant dans un système: en les condensant, notre auteur a pu être considéré comme l'expresssion unique de la doctrine de son temps."

[3] Camb. Mod. Hist. xii 709, 710. [4] Ibid 710.



the minds of statesmen, but as yet lacked authoritative statement in scientific form. Grotius's work is conservative. It is primarily concerned with the laws of war, upon which there was a comparatively abundant literature.[1] What he has to say about the relations of states in time of peace is inserted in the interstices of his treatment of the laws of war. Therefore it is found where the men of his time would expect to find it. He deals with subjects already well nigh obsolete, such as private war;[2] and he maintains the old view, which was quite inapplicable to the international relations of his day, that ordinary resident ambassadors could be refused admission because they were unnecessary.[3] Like his predecessors, he turns aside to discuss questions of constitutional law[4] and political science[5] which are remote from his proper subject. His natural law, like the natural law of the mediæval writers, is borrowed from and primarily applicable to the relations, not of states, but of individuals.[6] But in spite of all this his work is at once modern and prophetic. It proves, in the only form which would carry conviction to the age in which it was written, the fact that there is a law which governs the relations of states. It states in approved philosophical form what is the basis of that law, and in practical form what are its contents. The very comparison between the philosophical basis and the practical rule helped to shame rulers into recognizing the need for improvement. Grotius's manner of stating the strict law of war, and the "temperaments" which he advocated, is typical of the mind of the man and of the method of his work.[7] An accurate exposition of the established rules, coupled with practical advice for their improvement, was likely to effect far more than any number of imaginative sketches of an ideal law, and any amount of heated denunciation of the existing law.

We can compare Grotius with men like Accursius or Bartolus in the history of mediæval Roman law,[8] and with men like Coke in the history of the common law.[9] They all summed up in

[1] Les Fondateurs du Droit International 225-226.

[2] De Jure Belli et Pacis, Bk. i 1. 2.

[3] Ibid Bk. ii 18. 3, "Optimo autem jure rejici possunt quæ nunc in usu legationes assiduæ, quibus quam non sit opus docet mos antiquus cui illæ ignoratæ"; similarly Coke, Fourth Instit. 155, tells us that Henry VII. "would not in all his time suffer Lieger Ambassadors of any forain king or prince within his realm, nor he any with them, but upon occasion used ambassadors"; above 39, 40.

[4] Les Fondateurs du Droit International 186-187. [5] Ibid 187-189.

[6] Ibid 246-247, "Les règles qui s'imposent aux nations en l'absence de leur consentement sont toutes celles et seulement celles qui s'imposent à l'homme dans ses rapports avec ses semblables. . . . La science moderne l'a bien compris, puisque chaque auteur fonde sa doctrine juridique internationale sur certains droits fondamentaux des Etats: or, nous ne trouvons pas chez Grotius de théorie des droits fondamentaux des Etats."

[7] De Jure Belli et Pacis, Bk. iii 1-16.

[8] Vol. iv 221, 222. [9] Below 489-493

authoritative form the results of development made by a series of predecessors, and produced works which were the starting-point of new developments. Grotius summed up in authoritative form the works of many predecessors, and his work has been and is the starting-point of modern international law. But in one respect his work is greater than the work of any of those to whom I have compared him. His success in putting the law governing the relations of states upon a philosophical basis which satisfied his contemporaries, emancipated that law from its bondage to theology, and distinguished it from ethics. In other words, he did more than found a new method of treating old law; he founded a wholly new branch of law. Within thirty-six years after its publication (1661) a chair was created at the University of Heidelberg to expound the doctrines of the modern international law which he had created.[1]

Before this date the work of Zouche—the second of our famous English international lawyers—had shown clearly that international law had become a separate body of law, and an integral part of the law of civilized states.

Of Zouche's life and works, and of the character of his mind, I have already spoken.[2] The work which has given him enduring fame is that in which we are now interested. It is entitled *Juris et Judicii Fecialis sive Juris inter Gentes, et Quæstionum de Eodem Explicatio*, and it was published at Oxford in 1650. His later tract entitled *Solutio Quæstionis veteris et novæ, sive de Legati delinquentis judice competente dissertatio*,[3] which was called forth by the case of Don Pantaleone Sa, also deals with one of the problems connected with the same branch of law.

Zouche's work on "Jus inter Gentes" is divided, like very many of his other books, into two parts. The first and shorter part deals with Jus inter gentes, and states the leading principles of the law applicable, first to Peace and then to War, under his usual heads of Status, Dominium, Debitum and Delictum.[4] The second and longer part deals with Judicium inter gentes, and discusses particular cases under the same divisions.

The division of the law under the heads of Status, Dominium, Debitum, and Delictum is not the most happy for a book on international law.[5] But the plan of distributing the subject matter of the law into the two parts of Jus and Judicium, though not one to be commended at the present day, was more defensible in Zouche's day, when international law was young. In the first place, it clearly set before the reader the kind of cases in

[1] Les Fondateurs du Droit International 267.
[2] Above 17-18.
[3] Published at Oxford in 1657.
[4] Above 18.
[5] Holland's ed. of Zouche i, xii.



which there was a doubt, and gave some indication of how that doubt should be resolved. In the second place, it kept legal speculation in touch with actual modern facts. The same tendency to base the law on the positive practice of modern nations, which appears in Gentili's work, appears even more markedly in that of Zouche;[1] and, as we might expect from his training in the common law, most markedly of all in the work of Selden.[2] And Zouche could pursue this method more safely than Gentili, because Grotius had given to international law a settled position upon a philosophical basis satisfactory to the age in which he wrote. Thus both Zouche and Gentili foreshadow the school of English international lawyers which bases international law on the positive usages of nations, rather than upon a series of deductions from the a priori principles of a supposed law of nature. No doubt, as I have said, some such a priori basis was very necessary in the infancy of international law. It was still necessary when Zouche wrote. But it tends to become less necessary as the contents of the positive usages become more extensive and detailed. The methods and outlook of these two earliest English writers foreshadow the methods and outlook of most international lawyers in modern times.

Zouche was a disciple both of Gentili and of Grotius. His books contained a critical summary of their results, and popularized their work in England and Scotland.[3] He helped to make the new international law a part of English law; and his works have more than a merely insular fame.[4] This was due to three very considerable merits which they possess. In the first place, in his book international law appeared for the first time in a compact and orderly form.[5] In the second place, he so clearly defined it that no one for the future could be under any misapprehension as to its scope.[6] In the third place, he originated the modern division of the subject into Peace and War.[7] In his book the tradition, inherited from the mediæval books, of grouping the whole subject round the laws of War was finally abandoned. He was followed by a succession of civilians who, by the opinions which they gave to the government, helped to develop the principles which he had stated and explained.[8] But it was not till the last century that an English writer produced a treatise

[1] "Chez Gentilis et chez Selden, chez Zouch surtout c'est . . . l'élément praticien qu'on va voir prédominer. L'école internationale anglaise fut en effet éminemment pratique," Les Fondateurs du Droit International 327-328.
[2] Above 10-11.
[3] Les Fondateurs du Droit International 329.
[4] See Journal Soc. Comp. Leg. ix 353.
[5] Ibid 322.
[6] Above 51 n. 4.
[7] Les Fondateurs du Droit International 276.
[8] See Nys, Le droit Romain, le droit des Gens, etc. chap. vii.

on international law so comprehensive and so influential as that of Zouche.

We must now turn to the topic of commercial and maritime law. It is connected in some of its aspects with international law; and at the beginning of this period it was influenced by the civil law, and, to a large extent, was administered by the civil lawyers. But it was far more closely connected with the common law than international law then was or ever has been; and at the end of this period, there were clear signs that the common lawyers were succeeding in their attempts to oust the civilians from their control over it.

## III

## Commercial and Maritime Law

The broad outlines of our modern system of commercial and maritime law begin to emerge at this period. Though the origins of some of its rules must be sought in the collections of customs which made up the commercial and maritime law of the Germanic nations in the Middle Ages, the origins of most of its leading principles must be sought in the rules which, from a basis of Roman law, were being evolved in the great trading centres of southern Europe to meet the new needs of an expanding trade. In this section I shall endeavour to explain the way in which these principles either were received into or inspired additions to or alterations of the rules of English law.

In tracing the history of the courts which, at different periods, have administered the commercial and maritime law of this country,[1] I have necessarily touched upon some of the leading features of these two branches of the Law Merchant. Their most striking and most permanent feature was, as we have seen,[2] their international or, as I should prefer to call it, their cosmopolitan character. In the Middle Ages this feature is not peculiar to the Law Merchant. The universality of the civil and canon law, the universality of the political religions and ethical theories which their exponents assumed, and the broad similarities in the actual conditions of life which prevailed throughout Western Europe, give to many branches of mediæval law this cosmopolitan character.[3] If we look at the legal rules which

[1] Vol. i 526-573. [2] Ibid 526-530; below 61-62.

[3] In the early Middle Ages the idea of a law personal to certain classes of people which followed them wherever they went (cf. vol. ii 3 n. 2) had no doubt some influence. Thus in the Lex Visigothorum II. 3. 2 (cited Goldschmidt, Handbuch des Handelsrechts 105 n. 32) we read, "Ut transmarini negotiatores suis et telonariis



determined such matters as the position in the state held by the great feudatories, the various kinds of tenure, or the condition of the labouring classes, we can see that they share this character with the Law Merchant. No doubt there are broad differences between the laws upon these topics which prevailed in the various countries of Europe, just as there were broad differences in their political conditions. But it is well to remember that the rules of the Law Merchant were not the same all over Europe. One set of maritime customs prevailed in the northern countries of Europe, another in the Mediterranean towns and seaports;[1] and there were small varieties in the commercial and maritime laws of the different states in both these parts of Europe.[2] Why then have the cosmopolitan characteristics of the Law Merchant always seemed to lawyers of many different ages and countries to be its most striking feature?

It seems to me that the cosmopolitan features of the Law Merchant, though existing alike in mediæval and in modern times, are rather a modern than a mediæval peculiarity. I very much doubt whether these features would have seemed peculiar to a mediæval merchant or lawyer. The merchants were simply one of the many sharply defined classes of mediæval society;[3] and the customs of all these classes possessed cosmopolitan characteristics similar in kind if less in extent; while the civil and canon law possessed them in a far higher degree. But to

et legibus audiantur. Quum transmarini negotiatores inter se causam habent, nullus de aedibus nostris eos audire præsumat, nisi tantum modo suis legibus audiantur apud telonarios suos"; this idea of a personal law may have had some influence in earlier days upon the manner in which commercial usages spread over Europe; but it was mainly the influences mentioned in the text which are at the root of the cosmopolitan character of the Law Merchant of to-day; as Goldschmidt, op. cit., and Huvelin, Essai Historique sur le droit des Marchés et des Foires 384, 385, point out, this passage does not refer to judges elected by the merchants; these telonarii were royal officials appointed to collect the dues payable, Huvelin, op. cit. 389 n. 2.

[1] Vol. i 527-528; below 100.

[2] Mitchell, The Law Merchant 1-94 and authorities cited 8 n. 1; as Mr. Mitchell says, at p. 9, though "Everywhere the leading principles and the most important rules were the same, or tended to become the same," yet that, "each country, it may almost be said each town, had its own variety of Law Merchant," all being, however, "varieties of the same species"; thus we often find that cases are to be decided "secundum consuetudinem curiæ," see the Breve Pisani Communis (1286) i. c. 33; Statuta Pisani (Ed. Bonaini) i 89, 90; the Breve Consulum Curiæ Mercatorum (1305) § 82, ibid iii 59, 60. The Statuta Communis Bononiæ (1250) cited Goldschmidt, op. cit. 173 n. 105, direct "quod jus fori et mercati reddatur secundum consuetudinem fori sive mercati"; Straccha, De Mercatura (ed. 1553) 157b, talking of the contract of hire says, "Contractus a consuetudine contrahentium et loci interpretationem recipiunt"; the Munimenta Gildhallæ (R.S.) II. i 206 speaks of the "usus et consuetudines feriarum et villarum mercatoriarum"; the Red Book of Bristol 62 notes that the methods of dealing with absent defendants are very various, so that, "nullus omnino processum legis mercatoriæ in ea parte scire nec cognoscere poterit." The "Breve"—a document we frequently meet with in collections of Italian laws—was a short manual containing the oath of the Magistrate and his duties, Pardessus, Collection des Lois Maritimes iv 557; generally each Art had its Breve.

[3] Vol. ii 464-466; vol. iii 456-458; vol. iv 402.

the merchant or lawyer of modern times, accustomed to separate states and separate systems of law, the retention of these features was and is a peculiar feature; and, therefore, modern lawyers from the seventeenth century onwards have noted it as the most distinctive feature of that law.[1] Why then, we must ask, were the cosmopolitan features of the Law Merchant retained and even emphasized at a time when other branches of law were losing their cosmopolitan character?

There are, I think, three sets of reasons for this phenomenon. The first set of reasons is connected with the necessary and permanent conditions of trade, the second set is connected with the conditions of trade in the Middle Ages, and the third, and in my opinion, the most important set, is connected with the manner in which the Italian commercial law has permeated the whole of Western Europe.

In the first place, any sort of trade means travel, and trade carried on by sea means travel over large distances. Men of different countries meet on common businesses and under similar conditions. The business of carriage by land or by water, the business of exchange, present similar problems and generate similar rules. On the other hand, the organization and the activities of the more stationary classes of society tend to develop small differences which gradually crystallize into very different rules of law; and the growing separation between nations, which necessarily accompanied the rise of the modern territorial state, tended to strengthen these differences.

In the second place, the lawlessness of mediæval life necessitated the formation of unions of traders in gilds or corporations. These corporations combined to obtain from the ruling powers—

[1] The earliest statement comes from 1473-; in Y.B. 13 Ed. IV. Pasch. pl. 5 the chancellor said the case should be decided "secundum legis naturam qu'est appell par ascuns ley Marchant, que est ley universal per tout le monde"; but it is from the earlier part of the seventeenth century that this characteristic is most insisted on; see Gentili, De Jure Belli, Bk. i c. 1 (Holland's Ed. pp. 7, 8), "Et haec gentium juris (mercatores) non sane neglexerint, quæ valde ad ipsos spectaverint, et ad commercia ipsorum. Sunt scilicet juris gentium commercia. Et sic itaque notum de populis omnibus esse potuit;" Malynes, Lex Mercatoria 2, "Lex Mercatoria in the fundamentals of it is nothing else but (as Cicero defineth true and just law) *Recta ratio, natura congruens, diffusa in omnes, constans, sempiterna*. . . . Howbeit some do attribute this definition unto jus gentium or the law of Nations. . . . But, the matter being truly examined, we shall find it more naturally and properly belongeth to the Law Merchant;" Davis, Impositions (ed. 1656) c. 3, "The Law Merchant, as it is a part of the Law of Nature and Nations, is universall and one and the same in all countries in the world"; Zouche, Jurisdiction of the Admiralty Asserted, Assert. I, cites Davis and says that it is clear from his words that, "the causes concerning merchants are not now to be decided by the peculiar and ordinary laws of every country, but by the general law of nature and nations"; if we do not get in the books of continental writers like Straccha, Marquardus, or Ansaldus such clear statements of the cosmopolitan character of the Law Merchant it is because, as the authorities they cite show, they took it for granted.



from king or feudatory—the privileges which they needed to enable them to conduct their trade. When they met to trade in fairs or markets, they got a special protection against lawlessness, and a special set of judicial privileges, which enabled a speedy justice to be administered to all who frequented the fair or market.[1] If they were settled bodies carrying on trade in some defined place they got special privileges to regulate the affairs of their trade.[2] No doubt many other classes of men got their peculiar franchises and privileges in the Middle Ages—notably the landowners great and small. But their franchises and privileges were often used as a means to assert a turbulent independence of all authority. They were the great impediments to the establishment of a settled order and a uniform law; and as soon as a strong central government arose, they went down before it. But the merchants were the natural allies of efficient government; and conversely such a government was naturally inclined to show favour to men who increased the wealth of the country, and from whom a large revenue could be drawn. Thus the growth of the power of the state, which was fatal to many franchises and privileges, was favourable to the growth of the franchises and privileges possessed by the merchants. They were allowed to create and to develop their own commercial and industrial organizations, and their own machinery of justice.[3] It is obvious that these liberties increased the existing tendencies to evolve similar rules to govern similar mercantile transactions.

In the third place, the influence of the Italian cities was more marked and more permanent in the departments of commercial and maritime law than in any other branch of law. This is due firstly to the fact that, all through the Middle Ages, Italy was the centre not only of the legal but also of the commercial life of Europe; and secondly to the fact that in Italy a unique system for the settlement of mercantile disputes had been devised, which gave due weight at once to the exigencies of commerce, and to the establishment of technical legal rules based upon the facts of commercial life. We shall see[4] that for these reasons, the Italian solutions of the commercial and maritime problems to which a highly organized system of industry and commerce give rise, and the Italian machinery for applying these solutions to concrete questions, have had a direct and enduring influence upon the law and the institutions of many European states. From the thirteenth century onwards these Italian influences were directly affecting all the countries both of Eastern and Western Europe. The settlements of Italian merchants in many

[1] Vol. i 535-538; below 86-88.
[2] Vol. i 540-543; vol. iv 321-324.
[3] Below 90-96.
[4] Below 67-85.

countries in Europe,[1] and their presence at the great fairs[2] familiarized the nations of Europe with their commercial methods, their commercial organization, and their commercial law; and when, in the sixteenth century, the new geographical, political, and religious conditions created new centres of commerce, the reception of the Italian methods and organization and law, already begun, was completed.[3]

The development of commerce and industry, and the importation from Italy of legal principles adequate to rule this development, proceeded on similar lines in all the countries of Western Europe. This movement was not directly affected by religious and dynastic wars, and the clashing of the new independent states into which Europe was now definitely divided; for though religion and politics find it necessary to concern themselves with commerce, commerce is not directly concerned with either. Thus, while the canon law was ceasing to be a universal code for the whole of Western Europe, while the different countries of Europe were becoming more and more separate, and while, in consequence, many branches of their law public and private were losing some of that cosmopolitan character which they had possessed in the Middle Ages, commercial and maritime law were becoming not less, but more cosmopolitan. They were acquiring their modern international character.

This permeation of Italian commercial law was facilitated by the Reception of Roman law—indeed it is one, and perhaps the most important phase of that Reception.[4] We shall see that the rules of this commercial law were very far from being pure Roman law—that they represented living mercantile custom far more than any of the rules of the civil and canon law.[5] But mercantile customs had been worked up into technical rules of law in an atmosphere and with the help of juridical concepts derived from these two systems.[6] It was, in fact, the application of these juridical concepts to the ever-developing mercantile customs of Italy, which had enabled the merchants and statesmen and lawyers who applied them, to construct a system of mercantile courts and a permanent body of mercantile law—just as in the England of the thirteenth century the application of similar juridical concepts to our native customs had enabled the lawyers of the school of Bracton to establish the jurisdiction of our common law courts, and to lay the foundations of our common law.[7] This mercantile law, therefore, could easily be acclimatized in states which had

[1] Below 96, 113.
[2] Below 92.
[3] Vol. iv 244-246; below 129 seqq.
[4] Vol. iv 244-245.
[5] Vol. iv 243; below 77-85.
[6] Below 77-85.
[7] Vol. ii 269-270.



received the technical rules and ideas of the Roman law. It was not so easily acclimatized in England, because England had never received these technical rules and ideas to anything like the same extent.[1] In England therefore the reception of these rules and ideas was slower and more difficult. But though this has led to the growth of considerable differences in the mode of the development and in the ultimate form of the rules themselves, they were received in England; and therefore, in England as elsewhere, it is to them that we must look for the origins of our modern commercial and maritime law.

The manner in which these branches of English law have originated, and the peculiarities in their development, determine the manner in which we must trace their history. I shall relate it under the following heads: Firstly, the Italian Law Merchant and its reception throughout Europe in the sixteenth century; and secondly, the beginnings of English commercial and maritime law.

### *The Italian Law Merchant and its Reception throughout Europe in the Sixteenth Century*

The Romans possessed no separate system of mercantile tribunals and mercantile law.[2] The ordinary law and the ordinary judicial tribunals sufficed both for traders and for non-traders, because both the law itself and the procedure of the tribunals had been gradually adapted to the needs of commerce,[3] and because the peace maintained by the Roman Emperors gave to traders an ample security.[4] Thus the commercial and maritime law of Rome must be sought in many different parts of the Corpus Juris.[5] Such topics for instance as sale, hire, bankruptcy, agency, or shipping, are not grouped by themselves, but form simply a part of the ordinary law. To the English lawyer this may not appear to be strange. But in point of fact it is strange, for the English and the Roman systems are perhaps the only two systems in the world which have developed their commercial and maritime law as part of their ordinary law. On the Continent these bodies of law have been developed by a separate set of tribunals, and at

[1] Vol. iv 228-239, 285-289; below 151-154.
[2] Morel, Les Juridictions Commerciales au Moyen Age 14, 15.
[3] Ibid 15-17.
[4] Ibid 19 n. 1, citing Thaller, Annales du Droit Commercial (1892) 156, "Le commerce n'a pas à se façonner sur un type corporatif, quand les pouvoirs public placés au dessus de lui savent le protéger et le comprendre."
[5] Pardessus, Collection des Lois Maritimes i 85-132, has collected all the relevant passages from the Corpus Juris which relate to maritime law; for a short account see Desjardins, Introduction Historique à l'Etude du Droit Commercial Maritime 12, 13.

the present day are contained in separate codes.[1] The explanation of this phenomenon must be found in the manner in which the commercial law of modern Europe has grown up.

In the dark days which followed the fall of the Roman Empire commerce did not wholly cease,[2] but the calling of the merchants became adventurous, and their profits precarious. In order to obtain some sort of security they followed, as M. Morel has pointed out,[3] two sets of expedients. Either they got control of the government, or they allied themselves with royal power and obtained franchises and privileges which enabled them to carry on their trade. The first was the course pursued by the merchants of the Italian cities; and their example was soon followed by certain towns in the Spanish Peninsula and in the South of France. The second was the course pursued over the greater part of France, in Germany, in Holland and the Netherlands, and in England. In both cases the result was that a separate commercial and maritime law, based primarily on mercantile usage, gradually emerged, and expanded to meet the needs of an expanding trade.

In all departments of industry and commerce the Italian cities and the cities of the South of France were in the Middle Ages easily pre-eminent. From an early date they had gained either their complete independence, or a large liberty to make and administer the commercial laws which were suited to their needs. When other towns—French, German, Flemish, and Dutch—began to compete with them, the franchises and privileges which these towns had acquired enabled them to assume or to obtain power to modify their commercial organization and their commercial laws after the Italian model. Thus the mediæval distinction between commercial and ordinary law was emphasized, and, as I have already pointed out, the cosmopolitan character of the Law Merchant was stereotyped.

The position of the English merchants was in some ways peculiar. They had their peculiar customs and their peculiar privileges.[4] But England had a strong common law which was jealous of rival jurisdictions, and an active legislature which made

[1] In Italy, however, special commercial tribunals were suppressed in 1888, and commercial cases are now heard by the judges of the ordinary courts, Desjardins, op. cit. 455.

[2] Huvelin, Essai Historique sur le droit des Marchés et des Foires 143, 144.

[3] Op. cit. 20, 21; cf. Huvelin, op. cit. 386-387, "Deux systèmes sont possibles: ou bien ces tribunaux sont élus par les marchands eux mêmes (c'est la conception moderne des tribunaux de commerce), ou bien ils émanent, au même titre que les autres juridictions, de la puissance publique. . . . Ces deux systèmes ont existé, selon les époques, soit à l'exclusion l'un de l'autre, soit parallélement, et ils ont aussi, parfois engendré un système mixte."

[4] Vol. i 528-529, 540-541; vol. ii 372-375, 385-394; below 104-106.



common law for the whole country.[1] Moreover, England was commercially a backward country up to the first half of the sixteenth century. We have seen that it was not till the second half of the century that we get any great development of native commerce and industry;[2] and it was not till comparatively late, therefore, that the need to acquire an improved commercial law arose. When the need arose doctrines of foreign commercial law were adopted; but not in the same wholesale way as they were adopted abroad; and the continental organization of commercial courts was not introduced. Just as the influence of the continental reception of Roman law was far less considerable in England than it was abroad,[3] so was the influence of the foreign commercial law, and the foreign machinery for deciding commercial disputes. We shall see that at the very time when English trade began to expand, the common law was regaining more than all its old activity;[4] and the legislature worked mainly in sympathy with it.[5] But since most of the legal ideas which underlie our modern commercial law were adopted from abroad, it is clear that we cannot understand their origin unless we keep before our minds the continental environment in which they arose. I shall therefore give a brief sketch (1) of the commercial organization and the leading characteristics of the commercial law of the trading centres of Italy and the south of Europe; and (2) of the reception by the cities and states of northern Europe of the Italian ideas. We shall then be in a position to understand the somewhat peculiar position of English commercial law at the beginning of the sixteenth century, and the manner in which it was developed during this period.

(1) *The commercial organization and the leading characteristics of the commercial law of the trading centres of Italy and the South of Europe.*

The pecularities of the constitutional, commercial, and legal development of the Italian Republics in the Middle Ages led to the growth of unique mercantile organizations, which were permitted by the state to exercise supreme or almost supreme control over mercantile and maritime affairs. The manner in which they were constituted, and the powers which they gained determined to a large extent the nature of the law which they administered. I shall, therefore, in the first place say something of their constitution, and in the second place of the methods by which they gradually built up the law.

[1] Vol. ii 306-307, 310 396-400.
[2] Vol. iv 318-319.
[3] Ibid iv 237-239, 285-289.
[4] Below 143-144.
[5] Vol. iv 174, 187-189; below 421-423, 492-493.

*Constitution.*

By the end of the eleventh century a large number of the Italian towns had obtained their independence; and the merchants who inhabited them had got a free hand to organize their government after their own fashion.[1] Generally we find at the head of the government *consules de communi* assisted by a small council. These consuls absorbed all the powers of the older rulers—at Genoa and Pisa, for instance, they were the direct successors of the counts.[2] In spite of domestic dissension, the result of this independence was a great development of commerce and industry.[3] In its train, capital, banks, and all the financial organization which the existence of banks implies, began to make their appearance;[4] and with the growth of the prosperity and size of the town a more complex organization of government became necessary. In 1154 we first hear at Milan of *consules mercatorum*.[5] When first they made their appearance they acted as the deputies of the *consules de communi*, and, in this capacity, they performed various political administrative and judicial duties.[6] In the exercise of these duties they acted as state officials. But they fulfilled also other duties in another capacity. They were at the head of the numerous gilds or arts into which the merchants were divided;[7] and these gilds or arts assumed, in Italy as elsewhere, wide powers to issue regulations as to the conduct of their members, and to decide their legal disputes.[8] Thus the *consules mercatorum* exercised large powers over trade and a jurisdiction in commercial cases. These powers and this jurisdiction were not at first exercised by them in their capacity as officials of the city;[9] they

[1] Morel, op. cit. 22-24.

[2] Ibid 24, 25.

[3] Pardessus, op. cit. i *lxxviii*, *lxxix*.

[4] "Sous la protection d'un pavillon partout respecté, les richesses de l'Orient vinrent s'entasser dans les villes du littoral; dans les villes de l'intérieur, la fabrication des armes et des étoffes de laine créa des capitaux de réserve que des banquiers, célèbres sous le nom de Lombards, firent rapidement déborder sur toute l'Europe occidentale," Morel, op. cit. 26.

[5] Ibid 29.

[6] Ibid 30-32.

[7] At Pisa we read of the Curia ordinis maris, the curia artis lanæ, the consuls of the seven arts and the captain and consuls of the Sardinian ports, Breve Pisani Communis i c. 33; Bonaini, op. cit. i 89-90. At Florence we read of seven greater arts; and "une sorte de hiérarchie s'etablit entre eux"—First came the art of the judges and notaries, then (2) the merchants of the Calimala, (3) the Cambiatori, i.e. exchangers and bankers, (4) the manufacturers of wool, (5) the medical profession, (6) the manufacturers of silk, (7) the furriers and skinners, Perrens, Histoire de Florence ii 65. The Calimala gild, which played so great a part in the History of Florence, consisted of those who made fine woollen cloth; they got their name from the street in which they carried on their industry—"On l'appellait quelquefois *Strada francesca* mais plus souvent *Calimala* parce qu'elle conduisait à un mauvais lieu"; and, as M. Perrens says, this etymology appears clearly right as in old Italian, as in Spanish, "calle" means street, op. cit. i 194.

[8] See e.g. Bonaini iii 863-889 for the Breve Artis Fabrorum of 1305.

[9] Thus in the constitution of Milan of 1216, cited Goldschmidt, op. cit. 165 n. 74, it is said, "Nec consules negociatorum intelligantur esse officiales communis Mediolani."



were limited to the members of their own gild;[1] and the city courts therefore exercised ordinary jurisdiction in commercial cases.[2] During the fourteenth century these powers and this jurisdiction became gradually more extensive. They became a recognized department of the civic constitution, and their courts were recognized as a part of the judicial machinery of the state. It followed that their enactments upon commercial matters became part of the law of the city, and that the jurisdiction of their courts excluded that of the ordinary courts.

The process by which the *consules mercatorum* attained this position in the various Italian towns was very similar, and it was somewhat as follows:[3] The various gilds were very jealous of their powers. They compelled their members by severe penalties to obey their orders and to submit to their jurisdiction.[4] Sometimes they even compelled foreign merchants residing in the city and trading with their members to promise to submit to their authority, which promise came in time to be implied from the fact of residence.[5] But the gild, being a voluntary association, was powerless if a contumacious person acquiesced in expulsion. This defect was remedied by a closer alliance between the various gilds. They agreed to exclude certain classes of commercially undesirable persons;[6] and finally they united in an amalgamated society of gilds which was called the *Mercanzia*.[7] The executive body of this amalgamated society—the *Officium Mercanziæ*—generally consisted of the *consules mercatorum*, who were at the head of its various component gilds.[7] During the course of the fourteenth century an increasing number of cases were submitted by the civic authorities to the arbitration of this body;[8] it was finally recognized by them as an organ of the State

[1] "Privée, contractuelle, corporative telle nous apparait primitivement la juridiction de l'Art," Morel, op. cit. 38; Mitchell, op. cit. 41, 42.

[2] Ibid 42; thus the Statutes of the Calimala Art threatened with severe penalties any member who resorted to the ordinary courts, ibid 42 n. 1; it follows that the ordinary courts had this jurisdiction; in 1233 the Pisan curia maris was forbidden to interfere with cases that belonged to the curia legis, ibid 46.

[3] Morel, op. cit. 37-52; Mitchell, op. cit, 41-48; see Valroger, Les Consuls de la Mer au Moyer Age, Nouv. Rev. Hist. xv 43-58, for the development of the Pisan curia maris; as M. Morel says, op. cit. 53, "Nous sommes constamment reporté à l'histoire particulière de Florence, mais il n'est pas téméraire de généraliser et d'étendre les conclusions que nous avons formulées à la grande majorité des villes italiennes. A quelques détails près, l'histoire de la constitution des tribunaux de commerce est la même dans toutes les cités de la Péninsule."

[4] Mitchell, op. cit. 42 n. 1, citing a statute of 1301 made by the Calimala Art; Morel, op. cit. 43.

[5] Ibid 52.

[6] Ibid 39-40.

[7] Ibid 40-41; for the mode of the constitution of this body at Genoa in 1403-1407 see Leges Genvenses, Monumenta Historiæ Patriæ xviii col. 535-536.

[8] Morel, op. cit. 35, 36, and authorities there cited.

Government;[1] the ordinary courts were forbidden to interfere with it;[2] and its orders, its regulations, and its judgments were therefore binding upon all the members of the state and upon foreigners resident therein.[3]

The evolution of the bodies which made and administered maritime law was very similar. Genoa had its *Officium Gazariæ*,[4] and Pisa its *Curia Maris*;[5] and, in the course of the fourteenth and fifteenth centuries, most of the seaport towns of Italy had acquired bodies of maritime law administered by special maritime consuls. It is the Pisan *Curia Maris* which is the earliest of these bodies to possess judicial as well as administrative functions; and, historically, it is the most important, because it was the type and model of the maritime courts of the kingdom of Aragon, and therefore of the city of Barcelona.[6] At Barcelona this maritime court became a general commercial court;[7] and it developed the famous body of laws known as the Consolato del Mare.[8] This body of law, in spite of grave defects in its arrangements and composition,[9] has perhaps had a larger influence on the maritime law of Europe than the similar bodies of law

[1] Mitchell, op. cit. 43 n. 1, citing a statute of Brescia of 1429; for Genoa see Leges Genvenses, Mon. Hist. Pat. xviii col. 538, statutes of 1403-1408; at Genoa, as at Brescia, they could decide questions of their own competence, Leges Genvenses col. 542, Stat. Merc. of Brescia 1429, cited Mitchell, op. cit. 44 n. 1.

[2] Ibid 43 n. 1, citing statutes of Mantua of 1450, and of Brescia of 1429; Leges Genvenses col. 538.

[3] See ibid 619-620 for rules as to jurisdiction where foreigners were parties; for similar rules in other towns see Mitchell, op. cit. 44, 45.

[4] So called because it was appointed to look after Caffa, its trading centre in the Black Sea, the natives of which were known as Chazares; it assumed jurisdiction over navigation generally; when Genoa lost these colonies these duties were turned over to the Officium Mercanziæ, Pardessus, op. cit. iv 421-424, 432, 434; for the rules governing it see Leges Genvenses cols. 741-795.

[5] For the Breve Curiæ Maris of 1305 see Bonaini, Statuti Pisani iii 351-445.

[6] Mitchell, op. cit. 45-50, 56-64; cf. Valroger, op. cit. 43-57, 194-205; the leading work is that of Schaube, Das Consulat des Meeres in Pisa; it was the executive body of the Ordo Maris, which was originally a private league of defence against pirates; it came to look after all maritime matters, and eventually developed into an organ of the state.

[7] See the passage from the Judicial Order of the Court of the Consuls of the Sea, Black Book of the Admiralty (R.S.) iv 473-475 cited below 76 n. 3; and cf. ibid 463, 469, 483, 493; these regulations were issued between 1336 and 1343 for the guidance of the consuls of the sea at Valencia, and prefixed to the first edition of the Consolato del Mare printed at Barcelona in 1494, Black Book iv 451 n. 1.

[8] Printed in vol. iii of the Black Book; and for a short account of it see Desjardins, op. cit. 60-63.

[9] Ashburner, The Rhodian Sea Law cxx-cxxi says that not only is it verbose and often futile but that it is also academic—"the greater part of the work consists of ingenious suggestions by learned men, which were probably never practised by any mariner or enforced by any court"; on the other hand, Pardessus, op. cit. ii 1 n. 2, looking at its later influence, takes a very different view, "Il est impossible de méconnoitre la sagesse de presque toutes ses dispositions, qui sont devenus la base des lois maritimes actuelles de l'Europe."



developed by the Italian seaports.[1] This extensive influence of the Consolato del Mare is due partly to its fullness—it embodies ideas taken from many cognate sources;[2] partly perhaps to the commanding position of the Spanish monarchy in the sixteenth and early seventeenth centuries.

It is not only in the Spanish seaport towns that we can trace the influence of the Italian institutions. Their influence was equally great upon Marseilles, and the neighbouring trading centres of Montpellier, Nimes, and Narbonne.[3] In all these towns commerce and industry were organized in a similar manner; and all possessed consuls who administered commercial law to the merchants. The crusades led to the establishment of intimate commercial relations between these trading centres and the Italian cities on the one hand, and the eastern ports of the Mediterranean on the other. Their consuls were established in these ports;[4] and, in the Latin kingdom of Jerusalem, separate commercial and maritime courts were established to decide the cases of the merchants of all nations who resorted there.[5]

In the earlier mediæval period, when the powers of the gilds were restricted to their own members, their commercial jurisdiction necessarily depended on the personal status of the litigant quite as much as upon the nature of the question at issue. But, when these amalgamated societies of merchants became recognized as an integral part of the constitution of their several states their competence came to depend solely upon the nature of the question at issue. They necessarily assumed jurisdiction over all questions commercial, irrespective of the status of the parties; and thus there was evolved the wholly new conception of a separate commercial and maritime law depending mainly on mercantile custom and usage.[6]

[1] This was so even in the sixteenth century—Valroger, op. cit. 38 n. 4 says, "C'est ainsi qu'a Ancône Straccha écrivand au milieu du xvie siecle ne connait que le Consulat, et ne parle pas de l'ancien droit d'Ancône."

[2] Pardessus, op. cit. ii 20—it is more complete than any other maritime code "puisqu'il a emprunté de chacune d'elles ce qui manquoit aux autres."

[3] Morel, op. cit. 131-143; cf. Goldschmidt, op. cit. 222.

[4] Marseilles got trading privileges throughout the kingdom of Jerusalem in 1117 and 1136, Pardessus, op. cit. ii *viii*.

[5] The chapters on maritime law from the maritime Assizes of Jerusalem are printed in the Black Book of the Admiralty (R.S.) iv 498-519; the Latin kingdom at Jerusalem had both a maritime court—La Cort de la Chaene—and a mercantile court—La Cort de la Fonde, Black Book iv cv.

[6] Morel, op. cit. 52-53—"A force d'élargir le champ d'action de *l'officium mercanziae* on est arrivé a lui donner, en matière de commerce, une compétence personelle à peu près universelle, et petit a petit, . . . le caractère de cette compétence a subi une modification profonde. De personelle elle est devenue réelle . . . Toute convention passée par des marchands fut réputée convention commerciale et le tribunal qui, à l'origine, etait special aux marchands, devint special aux affaires commerciales."

*The Evolution of the Law.*

If we would understand the nature of this separate commercial and maritime law created by these organized bodies of merchants, we must glance briefly at the various ways in which they built up its different parts.

(i) In the first place, these bodies issued numerous and detailed orders to ensure the proper conduct of various branches of commerce and industry. Their power in this direction was wide. It was admitted that it extended even to negativing or altering a rule of the civil law.[1] But it was subject to certain conditions. In the first place, an order must not directly contravene a law made by the civic authorities.[2] In the second place, it must be just and reasonable.[3] In the third place, it must relate to matters mercantile.[4] No doubt also particular towns might impose special conditions.[5] But these three general conditions, laid down by the lawyers of the fourteenth and fifteenth centuries, were a generalization from the usual practice of the Italian towns of this period; and, through the works of the sixteenth and seventeenth century writers on commercial and maritime law, they passed into the general law of Western Europe.[6]

Subject to these conditions these powers were extensively used. The qualifications of practising lawyers,[7] the businesses of bill-broking,[8] banking,[9] and pawn-broking,[10] the equipment,

[1] Straccha, De Mercatura 250b—Is an enactment valid, "Quod contra scripturas mercatorum non possit objici exceptio præscriptionis?" "Et probat valere cum possit aliter quam jus commune decrevit statuere."

[2] Leges Genvenses, Mon. Hist. Pat. xviii cols. 536, 817; cf. Straccha, op. cit. 170b, "Nauticam consuetudinem præcipue spectandum esse dum modo legi non adversetur, hoc est a lege non reprobetur."

[3] Ibid 250b cites Baldus as saying, "non possint decernere quod naturaliter et evidenter sit injustum;" and at p. 251b he gives examples—"Delendum et illud statutum quod vetat opus ab uno cœptum ab alio perfici posse absque consensu ejus qui inchoaverit; et ille lex improbanda est quæ certas tantum personas artem aliquam, seu exercitium facere jubet, reliquos vero vetat."

[4] Ibid 248, "Sed hæc intelligenda sunt, ut statuere possint in his in quibus jurisdictionem habent, pertinentibusque ad mercaturam et ipsos mercatores, non autem in his quæ remota sunt ab eorum officiis et professione, exempli loco si super hereditatibus decernerent."

[5] Thus at Bergamo—Gild Statutes c. xxx cited Mitchell, op. cit. 31 n. 3—the statutes of the gild were to have the same force "ac si facta forent per Consilium Generale Communis Pergami," and sometimes they were expressly allowed to override the ordinary law, Mitchell, op. cit. 32, 33, citing Lattes, Il Diritto Commerciale nella Legislazione Statuaria 75 n. 10.

[6] Thus Marquardus, Tractatus Politico-Juridicus de Jure Mercatorum et Commerciorum (ed. 1662) Bk. iii c. ii § 1, allows them very large powers, "Primo igitur dubitandum non est quin Collegia Mercatorum approbata, singulares leges, consuetudines, ordinationes, et statuta specialia et singularia, etiam sine superioris confirmatione, condere, sibique jus proprium contra statuta generalia illius Civitatis facere possint."

[7] Leges Genvenses, Mon. Hist. Pat. xviii col. 725—regulations as to the College of Judges.

[8] Ibid col. 570—rules as to payment of Bills of Exchange.

[9] Ibid cols. 544, 545, 656-658.

[10] Ibid col. 622.



licensing, loading, and registry of ships, the nature and variety of papers which trading ships must carry,[1] the business of underwriting[2]—occupy a large space in the statutes of the Italian towns. Besides, there are detailed rules for the conduct of all the different wholesale and retail trades carried on in the town;[3] and some of these rules are very similar to the rules made by other towns in Europe—in Italy, as elsewhere, the law intervened to secure honest and skilled workmanship, reasonable prices, and fair wages.[4] But the greater volume and the more elaborate organization of trade gave rise to elaborate regulations upon such matters as shipping, banking, insurance, and bills of exchange, some of which do not appear in England till quite modern times.

(ii) In the second place, they entered into diplomatic relations with foreign countries and with neighbouring cities to secure for their own traders privileges, protection, and redress. Of their relations with the more distant foreign countries I shall say something more later. Here I must say something of the intimate commercial relations which were in this way established between the chief trading centres in Italy and in southern Europe.

In the days when the terms "foreigner" and "enemy" were synonymous it was natural that a wrong done by the citizen of a foreign state should be revenged upon all the citizens of that state. Even when this stage was passed, and peaceful relations between foreigners had become usual, the old idea survived in another form, which prevailed almost universally in Europe in the early mediæval period, and, in some states, survived very much later. In this form it gave rise to the principle that if a citizen of country A had been wronged by a citizen of country B, and was unable to obtain redress, he might get from the government of his state the right to get compensation from the property of any citizen of country B whom he could find.[5] In

[1] Leges Genvenses cols. 638-639; 741-795—the rules as to the Officium Gazariæ; cf. Calendar of State Papers (Venetian) i *lxi-lxviii* for the Flanders voyages undertaken by the Venetians, and the elaborate supervision exercised by the Council over all the details of these expeditions.

[2] Ibid cols. 572, 643-644.

[3] Statuti Pisani (Ed. Bonaini) iii 123—Breve spetiariorum; 125—Breve cappellariorum; 128—Breve tinctorum; 133—Breve artis specularіorum; 136—Breve sartorum; cf. Leges Genvenses cols. 669-730.

[4] Vol. ii 468-469; vol. iv 321-324.

[5] Vol. i 543 n. 7; vol. ii 394; Huvelin, Essai Historique sur le droit des Marchés et Foires 441-443; Morel, op. cit. 44-48; Mitchell, op. cit. 121-124; Goldschmidt, op. cit. 121, 122; Mas Latrie, Le droit de marque ou droit de représailles au moyen âge, Bibliothéque de l'Ecole des Chartes 6e serie II. 529 seqq., IV. 294 seqq.; for an English case of 1418 turning on this right of reprisals see Select Cases before the Council (S.S.) 95.

Italy this principle was known as the right of reprisals.[1] Obviously the remedy which it provided was clumsy, and open to grave abuses. In England, as between English merchants, it had been abolished by a statute of 1275.[2] What Edward I.'s statute did for England was effected for Italy in the thirteenth and early fourteenth centuries by negotiations conducted by the officials of the *Mercanzia* of the leading towns. The *Mercanzia* undertook to render the right unnecessary by giving legal redress for the wrongs inflicted on or suffered by foreigners, as well as for the wrongs inflicted on or suffered by their own citizens.[3]

The working of these treaties was helped materially by the institution of the *consules hospites* who, from the latter part of the thirteenth century, were appointed in the trading centres of the Mediterranean, to look after the interests of the foreign merchants resorting to them.[4] These consuls were appointed from among the citizens of the state in which they exercised their functions. Originally they acted as the hosts, the defenders, and the judges of their respective communities of traders.[5] But, as commerce increased, they necessarily ceased to be literally the hosts of the merchants whom they represented; and, as the law administered in these trading centres became uniform and applicable to foreigners and citizens alike, their judicial functions lost their importance. Thus they came to occupy the position assigned to them by our modern international law of advisers and assistants to the citizens of the nation whom they represented.[6]

The result of these developments was the evolution of a number of rules for deciding cases in which a foreign element existed,[7] which are at the root of our modern systems of Private International law. In the sixteenth century these rules, evolved principally in the Italian towns, were directly instrumental in inducing other European states to abandon the custom of reprisals,[8] to appoint consuls to look after the interests of their citizens in foreign states,[9] and to adopt some of the Italian rules for the

[1] Thus in the Leges Genvenses col. 539 the Officium Mercanziæ is directed always to take legal advice before a grant of reprisals is made.

[2] 3 Edward I. c. 23; below 93, 98 n. 2.

[3] Morel, op. cit. 47, 48; cf. the provisions of the Florentine Statute della Mercanzia of 1312, cited Mitchell, op. cit. 123, to the effect that, "Treaties be made with any land or community of Tuscany or elsewhere as might seem good to the five councillors [of the Mercanzia] that, as between the commune of Florence and the said communes, reprisals cannot and shall not be granted or conceded for any cause, save in case of robbery only."

[4] Schaube, La Proxenie au moyen âge, Revue de Droit International (1896) 525-556; they must not be confused with the *consules missi* and the *consules electi*, below 92 and n. 4; cf. Calendar of State Papers (Venetian) i *lv*, *lvii*.

[5] Schaube, op. cit. 529.

[6] Ibid 532-533, 542.

[7] See e.g. Leges Genvenses, Mon. Hist. Pat. xviii cols. 619, 620.

[8] Below 93, 98.

[9] Below 92, 150.



decision of cases in which a foreign person or a foreign transaction was involved.

(iii) In the third place, the close relations which thus existed between the bodies in the various towns which controlled commerce and industry, enabled the towns to create gradually, from the similar yet separate customs of their mercantile and maritime courts, a uniform body of mercantile and maritime statutes. It was obviously important to the trader that the mercantile law of neighbouring cities, between which intimate commercial relations existed, should be as far as possible identical. How to produce this identity was a problem which in the Middle Ages faced the Italian towns, as to-day it faces the various United States of America. The problem was solved by the appointment in different towns, sometimes permanently sometimes periodically, of officials called *emendatori* or *statutarii*.[1] Their duties, as M. Morel says, were to examine the practical results effected by the customs or statutes of the neighbouring towns, and to adapt those which worked well for the use of their own town. The result is that the Italian statutes on commercial and maritime matters became gradually more detailed and more identical. The Italian Law Merchant became both a comprehensive and a uniform body of law; and this fact accounts for the ease and completeness with which it was received all over Europe in the sixteenth century.[2]

The success of this legislation was largely due to the fact that it had behind it the practical experience of the commercial courts. To use English terms, it was largely codified case law; and we know from our own experience that the most useful and workable legislation turned out by Parliament is legislation of this kind. This brings us to the fourth, and, from the point of view of the development of commercial law, the most important sphere of the activity of these bodies—their judicial functions.

(iv) The jurisdiction which these bodies acquired over commercial and maritime affairs was very wide. At Genoa, at the beginning of the fourteenth century, the *Officium Mercanziæ* had power to decide "all the differences, lawsuits, questions, and cases which arose between citizens of Genoa in relation to

[1] Morel, op. cit. 78, 79; cf. Ashburner, op. cit. cxxi, cxxii; Mr. Ashburner at pp. cxix-cxx gives a list of some of the most important with their dates; for another list see Goldschmidt, op. cit. 167, 168.

[2] "La comparaison des statuts des villes lombardes, Monza, Milan, Crémone, Brescia, Bergame, ne laisse aucun doute à cet égard. Quand on passe successivement en reveu les compilations locales de ces villes, on n'a pas de peine à constater quelles contiennent des chapitres absolument identiques quant à la forme et quant au fond. Le plagiat est d'autant plus manifeste qu'il s'étend quelquefois même aux erreurs," Morel, op. cit. 78-79; cf. Ashburner, op. cit. cxxiv, cxxv.

trade."[1] The powers of the *Officium Gazarii* over all matters relating to maritime law were equally wide. It decided all questions between shipowners and their crews, and between shipowners and merchants; all questions turning upon damage to cargo, and jettison; and all matters dependent upon, arising out of, accessory to, or connected with the foregoing.[2] At Pisa the jurisdiction of the *Curia Maris* was quite as extensive;[3] and in addition the *curia artis lanæ*, the consuls of the seven arts, and the captain and consuls of the Sardinian ports, had also a large jurisdiction over matters which fell within their respective spheres.[4] That matters were similarly organized in the other Italian towns is clear from the fact that Bartolus could state as a general rule that "consuls elected by the college of Merchants have ordinary jurisdiction."[5] Straccha, Marquardus,[6] and Ansaldus[7] regard the possession of such jurisdiction as the most usual privilege belonging to the merchants of a state.

The question at once arises, What was the law which these mercantile tribunals applied? The answer would seem to be that in purely maritime matters there was a basis of rules derived from the civil law, the Basilicas, and the Rhodian sea law; that in commercial matters there was a basis of rules derived from the civil and canon law; but that the most important

[1] Leges Genvenses, Mon. Hist. Pat. xviii col. 537, "Omnes et singulas differencias lites quæstiones et causæ quæ inter mercatores Ianuenses orientur causa mercandi."

[2] Ibid cols. 742, 743, "Quæstiones vero et causæ quæ vertuntur seu verti possunt . . . inter patronum vel marinarium sive fidejussorem eorum, . . . sive inter patronum et mercatorem, occasione rerum positarum vel oneratarum in navigio, et emendationis, vel damni quæ vel quod pateretur pro dissipatione diminutione vel mancamento rerum et mercium prædictarum, sive occasione nauli vel jacti vel projecti . . . ac in et circa dependentia emergentia accessoria et connexa prædictis . . . audiant cognoscant declarent diffiniant corrigant et emendent."

[3] Black Book of the Admiralty (R.S.) iv. 473-475, "The consuls determine all questions which concern freight, damage to cargo laden on board ship, mariners' wages, partnerships in shipbuilding, sales of ships, jettison, commissions entrusted to masters or to mariners, debts contracted by the master who has borrowed money for the wants or necessities of his vessel, promises made by a master to a merchant, or by a merchant to a master, goods found on the open sea or on the beach, the fitting out of ships galleys or other vessels, and generally all other contracts which are set forth in the Customs of the Sea."

[4] Statuti Pisani (Ed. Bonaini) i pp. 89, 90—The Breve Pisani Communis of 1286; iii pp. 351-445—The Breve Curiæ Maris of 1305; ii pp. 863-889—The Breve Artis Fabrorum of 1305; iii pp. 651-741—The Breve dell'Arte della Lana. There are similar Breves for many other Arts.

[5] Cited by Straccha, op. cit. 260; he adds, 260b, "Non propterea ordinariorum [judicum] jurisdictio adempta censetur quinimo et ipsi mercatores et consules ordinariis judicibus subjiciuntur."

[6] Op. cit. Bk. iii c. ii § 1 cited above 72 n. 6; ibid Bk. iii c. vi. § 54.

[7] De Commercio et Mercatura, Discursus Generalis (ed. 1689) §§ 41-44 (p. 631)—"Solet etiam inter privilegia Mercaturæ recenseri, quod eorum stylo stari oporteat, ita ut hic p. evalere debeat dispositioni Juris Communis. . . . Et ob id jure merito quando tractatur de legibus publicum commercium concernentibus, adhiberi soleat votum et judicium mercatorum."



sources both of commercial and maritime law were the rules made by these courts to meet the new needs and the new problems set by an expanding commerce carried on under mediæval conditions. These rules were the basis of those maritime and commercial statutes of the Italian cities and the ports of Southern Europe, which have exercised so great an influence on the commercial law of Western Europe.

Mr. Ashburner has pointed out that in the earlier maritime statutes there is a constant reference to "usus" and "consuetudo"; and he justly thinks that the authorities "clearly point to the existence, if not of a general sea custom for the whole Mediterranean, at least of a custom extending beyond the jurisdiction of the individnal state."[1] The detailed comparison which he makes between the provisions of the civil law, the Basilicas, and the Rhodian sea law on the one side, and the provisions of the Italian statutes of the twelfth and thirteenth centuries on the other, illustrates the manner in which the elaborate Italian codes of maritime law were built up upon the basis of the law of Justinian and the Eastern Empire.[2] Sometimes the provisions of the Roman law were retained. But more often they were varied in all directions; and a large superstructure of detailed rules, evidently suggested by the concrete problems which came before the maritime courts, gradually superseded the original basis. If we said that the Roman rules had been turned to modern uses we should not perhaps be saying anything historically incorrect; but we should be exaggerating the importance of the historical basis. These Italian maritime courts, were doing for maritime law what the English common law courts were doing for the English common law. They were building up from a basis of mediæval maritime custom and Roman law a wholly new system of maritime law.

The influence of the civil law upon the Italian commercial law was of the same general character as the influence of the civil law, the Basilicas, and the Rhodian sea law upon the Italian maritime law; but it was greater in extent.

In the first place, the civil law conferred both upon commercial and upon maritime law a service of a like character to

[1] The Rhodian Sea Law cxxii-cxxv.

[2] Ibid cxxix-ccxciii; as M. Lefort says, Bensa, Histoire du contrat d'Assurance au moyen âge (traduit par Valery), Introd. viii n. 1, "Il faut noter, d'ailleurs, que les principes du droit commercial recueillis par les Romains et conservés au Digeste, principalement sous le titre De Lege Rhodia de jactu, ont précédé toute la legislation commerciale d'Italie. On doit admettre . . . que cette partie de la loi romaine était des mieux connues et des plus appliquées au moyen âge puisqu'on trouve bon nombre de manuscrits des onzième et douzième siècles qui ne contiennent que ce titre, détaché du reste du corps des lois, pour l'utilité des navigateurs et des commerçants."

that which it conferred upon many other branches of law by supplying it with a concise technical language. This service was conferred mainly through the profession of the Notaries; and since the work of this profession has had a very permanent influence upon commercial law I must say a few words about it.[1] The term "Notary" meant originally a scribe who used "notæ"—in other words, a shorthand writer.[2] These scribes were employed under the Roman Empire by the Tabelliones. These tabelliones either held a public position as clerks to the provincial or municipal magistrates, and in that case they both attended to the non-contentious business of the courts and drafted documents; or they were employed solely by private clients in the latter capacity. In either case these documents drawn up by them had greater weight than documents drawn up by a private person. They were *instrumenta publica confecta*. But they were not entitled to the full status of *instrumenta publica* till registered in court.[3] In the earlier mediæval period similar officials called notaries, attached to the courts of pope, emperor, and counts palatine, make their appearance; and it came to be thought that all notaries must be officers of a court, and therefore appointed by pope, emperor, or count.[4] Thus there arose a class of notaries who had been given a definite status by papal or imperial authority. The fact that they thus acted under official sanction, the fact that they were officers of a court, tended to invest the documents drawn by them with greater sanctity. In the course of the twelfth and thirteenth centuries these documents not only attained to the dignity of *instrumenta publica*, they also gained executive force, i.e. they could be enforced like judgments of the court.[5] Thus it happened that almost all mediæval documents of any importance were drawn by them.[6] Obviously in the trading centres of Europe the preparation of commercial documents must have formed the largest part of their work; and a very cursory glance at any collection of these documents will

[1] See the account given by Brooke, The Office and Practice of a Notary in England (ed. 1901), by Cranstoun; the following account is based on chapter 1 of that book; cf. Mitchell, op. cit. 108-110.

[2] Brooke, op. cit. 3. [3] Ibid 3-5. [4] Ibid 6-8.

[5] Ibid 9-10; Mitchell, op. cit. 110 n. 1; Blancard, Documents inédits sur le commerce de Marseilles au moyen âge i *xxxvi-xliv* gives us an account of the regulation of the notaries of Marseilles; in the collection which he has printed there are comprised the Notules d'Amalric—1031 abstracts of commercial documents drawn by the notary Amalric in 1247-1248; on the death of a notary his books were either handed to his successor, or deposited among the public records; the Notules d'Amalric have been preserved because they were thus deposited; for references to other collections see Ashburner, op. cit. cxxv-cxxviii; they never gained so important a position in English law; as to this see below 114-115.

[6] Blancard, op. cit. i *xxxvi* says, "Sa fonction avait un caractère si universel que rien n'y échappait, ni la politique, ni l'art, ni le commerce, ni l'industrie, ni la vie publique, ni le foyer."



show the large extent of the influence which they exercised upon commercial law. It was similar in kind to the influence which the English conveyancers have exercised upon the English land law.[1] They made the common forms used in the trading centres of Southern Europe, and when the law used in these centres spread over the rest of Europe, these common forms came with it, and are the basis of the documents which Merchants all over the world are using to-day.[2]

In the second place, the part of the civil law which specially influenced the growth of the Italian commercial law was, as we might expect, the law of obligations. It is not too much to say that the fullness and logical exactness of this part of the civil law has made it one of the most important of the bases of modern commercial law. The classification of contractual obligations to be found in the Corpus Juris, and the minuteness with which the rights and liabilities of the parties are analysed; the discussion of the general nature of contractual obligations; the many matters relating to their operation and the causes of their invalidity which are grouped round the Stipulatio; the analysis of delictual obligations, and especially of such topics as dolus and culpa—made up a body of law which could deal adequately with very many of the new commercial problems of the time. In the fourteenth and fifteenth centuries the treatment by the glossators of the topics of the new commercial law is generally to be found in their comments on the titles of Code and Digest which deal with obligations contractual or delictual;[3] and in the seventeenth century a considerable section of the great treatise of Marquardus is grouped round the leading heads into which the Roman contract system falls.[4]

The influence of the canon law was different from that of the civil law, but not less extensive. The civil law influenced mainly the technical development of the law. The canon law influenced mainly the substance of the law, and the machinery

[1] Vol. iii 218-219.

[2] See e.g. the charter party made at Pisa in 1263 which is cited by Ashburner, op. cit. clxxix-clxxxii; we may remember that the terms "insurance" and "policy" come from Italy, and that, "up to recent times all policies began with the words, 'In the name of God Amen!' imitating the customary old Italian commencement 'Dio la salvi, Amen!' The pious phrase is no more known to the underwriters of the present day. Still every policy . . . finishes with a sentence in use for upwards of three centuries, 'And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance made in Lombard Street.' The Lombards are gone, but Lombard Street still lives at Lloyds," Martin, History of Lloyds, 31, 32; see below 138 n. 5, 139, 143.

[3] Thus Goldschmidt, op. cit. 174 n. 106, cites the commentary of Bartolus on the passages of the Digest dealing with Mandatum, and the commentary of Baldus on the passages of the Code dealing with the same subject, to prove that, "in causis mercatoriis æquitatem præcipue spectandum."

[4] Op. cit. Bk. ii cc. viii x.

by which it was applied. The reason why the canon law was able to exert this influence upon the development of commercial law rests at bottom upon the manner in which the Canon law put into legal form the religious and moral ideas which, at this period, coloured the economic thought of all the nations of Western Europe.[1] It is true that the precocious political and commercial development of the Italian cities caused these religious and moral ideas to be subordinated, at an earlier date than elsewhere, to the desire to increase the wealth and power of the state.[2] But Italy, like the rest of Europe, felt these influences; and therefore the rules of the canon law, in which they were elaborated in legal form, necessarily had a wide and varied influence on the substance of the law.

Of the nature and extent of that influence it is difficult to speak summarily; and it would be a long and difficult task to appraise accurately the extent to which the canon law retarded, and the extent to which it assisted at different times and in different places, the development of commercial law.[3] On the whole it is probable that its influence was beneficial. In earlier days when commerce was in its infancy it helped to keep the peace and protect the persons of the merchants;[4] and in later days, when commerce was becoming organized, it helped to guarantee the sanctity of mercantile transactions.[5] No doubt the necessity of evading its stern prohibition of usury made the developments of certain branches of the law tortuous and complicated. But there is reason to think that the effects of this prohibition have been exaggerated; and we shall see that it did not in fact impede commercial development so greatly as is sometimes supposed.[6] On the other hand the canonist's view that faith should be kept,[7] in whatever form the promise

[1] Vol. ii 468-469; vol. iv 316-319.

[2] Vol. iv 318; thus at Genoa in 1403 it was enacted that anyone who, having entered into a mercantile contract "maxime per viam cambii vel assecuramenti," alleges that it is illegal or usurious, and takes proceedings to have it declared void before any court, lay, or ecclesiastical, shall be fined—"Si enim, per hæc et similia impedimenta, instrumenta cambii et alii contractus mercantiarum facta cum scripturis vel sine non possent executioni mandari, verteretur in magnum damnum et incommodum civium et mercatorum Ianuensium, qui communiter faciunt similes contractus, nec aliter possent exerceri mercimonia, nec navigia navigancia expedire," Mon. Hist. Pat. xviii col. 971.

[3] Morel, op. cit. 75, 76.

[4] Below 86-87.

[5] What Huvelin says, op. cit. 358, of the evolution of the influence of the peace of the market can be applied to the evolution of the influence of the canon law—"Par une autre evolution . . . elle (la trêve conclut en faveur de commerce) a changé d'objet. Après avoir, à l'origine, assuré la securité matérielle du trafic, elle a fini par en assurer principalement la sûreté intellectuelle et morale."

[6] Vol. viii 100-112

[7] "Ob utilitatem publicam Fides vel, ut Baldus ait, veritas negocii simpliciter attendi, et præ ceteris stricte observari debeat," Marquardus, Bk. ii c. viii § 2; Straccha, op. cit. 247-247b, explains that Bartolus said nothing inconsistent when he says in one place, "in curia mercatorum jura civilia servari," and in another that "agi ex nudo pacto"; "quoniam strictum illud jus, quod nuda pactio actionem non pariat, ex circumstantia personæ mercatorum temperandum moderandumque ex mente et verbo legis placuit."



was expressed, helped forward the development of forms of commercial contract which were quite unknown to the civil law;[1] it assisted the legislature to deal adequately with the new forms of fraud and sharp practice rendered possible by a more elaborate organization of commerce;[2] and thus it contributed to enforce those high standards of good faith and fair dealing which are the very life of trade. These were considerable services. But to my mind the most considerable of the services rendered by the canon law was the assistance it gave to the establishment of a workable system of procedure in commercial cases. It was the most considerable of its services, because it enabled a definition of the spheres of the lawyers and the traders to be arrived at, which allowed legal effect to be given to new commercial usages, and yet maintained a due regard for legal principles. This settlement of the respective spheres of the lawyers and the merchants I regard as one of the main causes of success of the Italian commercial and maritime tribunals in evolving a system of commercial and maritime law. I must therefore say a few words as to the manner in which it was arrived at, and as to its terms.

The consuls who administered commercial and maritime law in the Italian cities were generally required to administer justice "sine strepitu et figura judicii," or "summatim et extra ordinem," or "summarie et de plano."[3] The question at once arose, what meaning was to be attached to these phrases? Clearly we are face to face with the same problem as that which was presented to the English judges of the thirteenth century—the combination of a due regard for the claims of substantial justice with a system

[1] The contract of Insurance, vol. viii 273-98 is a striking illustration; as Marquardus says, Bk. ii c. xiii § 4, it was hardly discussed at all by the lawyers before Straccha; equally striking are the rules as to assignability and negotiability of obligations, Pt. II. c. 4 I. § 2; thus Marquardus says, Bk. ii c. xv § 6, "In hac enim ex praxi et stylo quotidiano observatur, æque creditorem ac debitorem, sine expressa stipulatione delegare posse; et per delegationem etiam creditorem vice creditoris, ut debitorem vice debitoris, ex natura correlativorum constitui posse"; though, as he pointed out, ibid §§ 9 and 10, a liability cannot be transferred without the creditor's consent, a right can be transferred without the debtor's consent, "cum ejus non intersit cui solvat"; cf. ibid § 17, "Nos autem de delegatione per assignationem, transportationem, vel inductionem, ut mercatores loquuntur, facta; quo in passu delegans seu transcribens cambium delegato acceptanti, ulla retractatione mandati aut alio quovis modo præjudicare non potest"; cf. Pardessus, op. cit. iv 421, as to the obvious necessity of adding to the provisions of the civil and canon law.

[2] Thus Straccha, op. cit. 47-56, cites the opinions of Baldus and other jurists as to the various questions which arise as to property in merchants' marks, and the liability which arises if one merchant fraudulently uses another's marks.

[3] Morel, op. cit. 58 seqq.; Mitchell, op. cit. 12-16 and references there cited; Goldschmidt, op. cit. 174 n. 106.

of procedure rigid enough to be workable.[1] Clement V. in 1306 attempted to solve the problem by the Decretal *Saepe contingit*.[2] It frequently happens, runs the Decretal, that we direct cases to be heard "simpliciter et de plano ac sine strepitu ac figura judicii." The meaning to be attached to these expressions is much controverted; and so, to remove doubts, we decree that a judge, directed to hear a case in this way, shall not exact a libellus, shall not demand a litis contestatio, shall be able to sit on holidays, shall remove all occasions for delays, and shall cut short litigation as much as he can, by refusing dilatory and vain defences and appeals, and by repressing both the disputes of advocates and procurators, and the needless number of witnesses. He must not, however, abridge the suit to such an extent that it cannot be fairly stated and defended. There must be a proper citation, and oaths that the proceedings are in good faith and that the truth will be spoken must be taken. Positiones[3] can be used unless the parties agree to exclude them; and the judge may question the parties whether requested by them or not, when it appears to him to be equitable. Parties must be cited to hear a definitive judgment, and it must be in writing. But the other formalities used in giving judgment may be omitted.

The words of this Decretal were elaborately and sympathetically expounded by the jurists of the succeeding centuries.[4] They interpreted them as authorizing, not only such modifications in

[1] Vol. ii 251.

[2] Clem. v, xi 2, "Sæpe contingit, quod causas committimus, et in earum aliquibus simpliciter et de plano, ac sine strepitu et figura judicii procedi mandamus; de quorum significatione verborum a multis contenditur, et qualiter procedi debeat dubitatur. Nos autem, dubitationem hujus modi (quantum nobis est possible) decidere cupientes, hac in perpetuum valitura constitutione sancimus, ut judex, cui taliter causam committimus, necessario libellum non exigat, litis contestationem non postulet, tempore etiam feriarum, ob necessitates hominum indultarum a jure, procedere valeat, amputet dilationem materiam, litem, quantum poterit, faciat breviorem, exceptiones, appellationes dilatorias frustratorias repellendo, partium advocatorum et procuratorum contentiones et jurgia, testiumque superfluam multitudinem refrenando. Non sic tamen judex litem abreviet quin probationes necessariæ et defensiones legitimæ admittantur. Citationem vero ac præstationem juramenti de calumnia vel malitia, sive de veritate dicenda, ne veritas occultetur, per commissionem hujus modi intelligimus non excludi."

[3] They were statements drawn up by both parties to be used as a basis for the examination of opponents by the judge; for a clear account of them see Langdell, Equity Pleading, Essays, A.A.L.H. ii 761, 762.

[4] Marquardus, op. cit. Bk. iii c. vii §§ 9 and 10, discusses elaborately what steps in the procedure are "Naturalia" and unable to be dispensed with, and what are "Civilia" and able to be dispensed with—"Naturalia sunt (1) Citatio, (2) Brevis narratio sive expositio causæ, (3) Petitio, (4) Probationes semiplenæ, (5) Cognitio causæ saltem aliqua et levis, (6) Denique sententia sine conclusione. E contrario civilia sunt hæc:—(1) Libelli oblatio, (2) Articulorum compositio, (3) Litis Contestatio, (4) Feriæ in honorem hominum indictæ, (5) Dilationes et termini, (6) Publicatio attestationum, (7) Jusjurandum calumniæ . . . (8) Conclusio in causa, (9) Denique recitatio sententiæ ex scripto a judice sedente facta. Hæc inquam mere sunt Civilia, sive juris positivi: ideoque in judiciis summariis secundum Doctores omitti possunt;" cf. Straccha, op. cit. 269b, 270b, 276, 276b.



the law of procedure as would make for the speedy hearing of commercial cases, but also such modifications in the law as were necessary to enable substantial justice to be done without regard to any merely technical difficulties.[1] No doubt the details of rules of procedure varied much from place to place—the rules as to the competence of different courts to deal with certain classes of cases according to the amount at stake, rules as to appeals, rules as to the course to be followed when the judges differed, rules as to process against an absent or a contumacious defendant, were very various.[2] But running through all the mass of particular rules there are the two guiding principles that the procedure must be simple and speedy, and the law must be equitable. Straccha cites Clement's Decretal, and says in effect that all formalities may be dispensed with, the omission of which is consistent with an orderly hearing of the case.[3] At the same time he lays it down that the law must be above all equitable and free from the "apices juris." This principle he says, our modern lawyers have laid down in six hundred different[4] places. Straccha's words are cited and amplified by all his successors.[5]

It was this purging of the law of barren technicalities which enabled the merchants to take a position of importance, equal if not superior to that of the lawyers, in the mercantile tribunals, and so to modify the law to suit the exigencies of trade. The merchants, who were thus set to decide mercantile cases simply and summarily, thought with reason that they could decide the general run of mercantile cases without the intervention of the lawyers. Thus, many of the city statutes prohibit the employment of lawyers except in certain cases. If both parties desired to employ them, if the court found that the case depended upon a question of law which it could not solve, or if the court differed in opinion—then the lawyers might be called in.[6] The

[1] Straccha, op. cit. 246, citing Bartolus on this point, says, "Apices juris esse putat, quæ subtilitatem quandam respiciunt magis quam facti veritatem, verbi gratia, si esset instituta directa actio cum utilis competit, vel non esset lis contestata et similia."

[2] Morel, op. cit. 58-74, gives a good account of some of these varying rules in different towns.

[3] Op. cit. 270b, "Sed hæc intelligenda sunt dummodo tanta non sit obscuritas et incertitudo quæ res defensionem atque facultatem deliberandi adimet; intelligi debet quid sibi actor voluerit, licet generaliter protulerit."

[4] Ibid 244b, "In curia mercatorum æquitatem præcipue spectandam et ex bono et æquo causas dirimendas esse, et de apicibus juris minime congruere nemo est profecto qui nesciat. Id enim in sexcentis locis recentiores jurisconsulti tradidere."

[5] See e.g. Ansaldus, op. cit. pp. 626, 627, §§ 1-3, and 7-11.

[6] Statuti Pisani (Ed. Boniani) i pp. 230-232—the Breve Pisani Communis of 1286; Leges Genvenses, Mon. Hist. Pat. xviii col. 537—the Officium Mercanziæ may take legal advice if they see fit, but generally they must proceed "sine consilio jurisperiti nisi ad utriusque partis instanciam; ibid col. 817; but ibid cols. 813, 814 a list of

lawyers it was thought should be employed to settle points of law, and not to argue matters of fact, and to put a good face on a bad case.[1] The danger of such a set of rules is of course that each case will be decided on its own facts according to the individual views of the judges, and that no legal principles will be evolved. But, if we may judge from the books produced by the writers of the sixteenth aad seventeenth centuries, this danger was successfully avoided.[2] The merchants had, it would seem, taken the advice given to them by Straccha, and had not thought themselves more equitable than the law.[3] When, in the sixteenth century, the Italian system of commercial courts was introduced into other countries, this danger was considerably less. The practice of those courts had given rise to bodies of law which were generalized and explained by the legal writers of the sixteenth, seventeenth, and eighteenth centuries. The mercantile tribunals had therefore fixed laws to guide them; and even the lawyers admitted that they could do a more speedy and a better justice in mercantile cases than the regular tribunals.[4]

In these various ways therefore the Italian cities laid the foundations of our modern commercial and maritime law, and evolved the pattern of the commercial and maritime tribunals which have prevailed over the greater part of western Europe. To them we must look for the origins of the idea of a negotiable instrument and for the elaboration of many of the leading principles of our modern law on this topic. Similarly they elaborated the law as to banking and as to commercial partnerships both of the limited and unlimited variety; while the exigencies of commerce compelled them to lead the way in the development of a bankruptcy law, and in the introduction of modifications of the law prohibiting usury. In the department of maritime law they

cases is given which "spectant quam plurimum ad juristas utpote questiones de principalibus juris apicibus descendentes," and cannot therefore be sent to arbitration; presumably in these cases the assistance of the lawyers would be invoked.

[1] "L'intervention des avocats donnait lieu devant les tribunaux civils à des discussions et à des chicanes aussi interminables que steriles, qui entrainaient naturellement des pertes de temps et d'argent. Afin d'éviter cet abus, le droit de représentation devant les tribunaux de commerce fut strictement limité," Morel, op. cit. 62.

[2] We have seen, above 83 n. 6, that it was admitted at Genoa that there were certain cases which could best be decided by the lawyers; and it is clear from Straccha's book that they were frequently consulted; thus at p. 181 he mentions, "Baldus noster qui in jure nostro propter ingenii acumen et frequentes disceptationes forenses primum locum obtinet, aut certe post Bartolum;" cf. also ibid p. 233.

[3] Op. cit. 285, "Consulant itaque mercatores in dicendis sententiis (ubi causæ expostant) jurisconsultos bonosque viros. Vetus est enim illud, ne sutor ultra crepidam, et felices essent artes si de illis soli artifices judicarent. Et se lege ipsa clementiores aut æquiores ne putent;" at p. 285b he cites Baldus as saying, "Nos sequi æquitatem rationi conjunctam, non imaginariam et nostri capitis."

[4] Marquardus, op. cit. Bk. iii c. vi § 54, writing De judicibus et consulibus Mercatorum, says that they ought to be appointed in all "emporia" to decide cases equitably and without legal technicalities.



made elaborate rules as to the capacity, loading, condition, and equipment of the ship; as to the legal position and legal relations of the various parties to a maritime adventure—shipowner, merchant, captain, and crew; and as to maritime partnerships. The various legal possibilities which might arise out of the contract of carriage by sea were very fully worked out; and this involved a treatment of such subjects as the results of loss from pirates, fire, or wreck—"the three normal maritime dangers"—maritime loans, average, jettison, contribution, collision and salvage.[1] Last but not least it was in relation to maritime law that the conception of an insurance first appeared.[2]

Some of these branches of commercial and maritime law were, as we shall see, introduced into England in the sixteenth and early seventeenth centuries; and in the second Part of this Book I shall sketch briefly the history of their technical development. But, in order that we may understand the way in which they were introduced into our law, and the manner in which they were subsequently developed, it is necessary first to say something of their gradual reception in the trading centres of northern Europe.

(2) *The reception by the cities and states of Northern Europe of the Italian ideas.*

We have seen that we must look to the franchises conceded to the merchants for the beginnings of the commercial law of the cities and states of Northern Europe.[3] On the other hand for the beginnings of their maritime law we must look to the customs observed in the principal seaport towns.[4] Both these allied branches of the Law Merchant were influenced in the sixteenth century by the rules which had been evolved in the great trading centres of southern Europe; and both therefore tended to become parts of one cosmopolitan system. But seeing that the mode of their development was somewhat different, and seeing that in some countries they continued to be administered by different tribunals, I must deal separately with the history of their growth.

*Commercial Law.*

For the origins of the commercial law of the cities and states of Northern Europe we must look to the franchises and privileges given to those who held and to those who resorted to a market. Thence originated a market and a market law which constituted an important, perhaps the most important element, which

[1] Mr. Ashburner, in his introduction to The Rhodian Sea Law pp. cxxx-ccxciii, has given an admirable account of the manner in which the Italian cities built up a maritime law to suit mediæval needs, and of the principal doctrines of that law.

[2] Vol. viii 273, 274, seqq. [3] Above 63.

[4] Vol. i 527-528; below 100.

differentiated the town from the other communities of the land. Round these periodic markets a permanent trade grew up, and with it, gilds of merchants and traders. But this trade was at first an essentially domestic trade. In the thirteenth and fourteenth centuries the growth of foreign trade led to the establishment of international fairs, possessing privileges which enabled their courts to apply to all the merchants who traded there the more complicated rules which this larger trade demanded. Many of these rules were necessarily borrowed from the great trading centres of the south from which the principal merchants came. Sometimes also leagues and associations of merchants were allowed to settle in the various states of Northern Europe; and their commercial dealings were necessarily regulated by the laws applicable to this larger trade. Thus the rules made in the great centres of commerce began to be known in the northern as well as in the southern countries of Europe. But as yet they stood apart from the ordinary law of the nascent state—they were applicable only or chiefly to dealings in the periodic fairs, or to the business of the companies of foreign merchants who had been permitted to acquire a commercial domicile. In the sixteenth century these rules became part of the ordinary law of the state. The change of trade routes caused by the geographical discoveries ruined many of the great mediæval fairs; and the establishment of efficient government and improved means of communication rendered the establishment of new fairs unnecessary. At the same time privileged settlements of foreigners ceased to be permitted, since they were opposed both to the political and to the economic interests of the territorial state.[1] The new companies formed for trade and colonization were composed of the subjects of the state.[2] Each country had in its chief trading centres permanent fairs, the transactions of which were governed by a body of law which was derived partly from the market law developed in its towns, but chiefly from the rules observed in the periodic fairs in or the trading centres of the south of Europe. Therefore in dealing with this subject we must consider the influence (1) of the market law of town and gild; and (2) of the fairs and the associations of foreign merchants.

(1) The market law of town and gild.

In the disturbed period which followed the fall of the Roman Empire the periodic markets were the sole seats of commerce;[3] and church and state combined both to recognize that a special

[1] Vol. iv 333; below 113.

[2] Vol. iv 319-320, 333.

[3] Huvelin, op. cit. 197, "le marché, au commencement de la période féodale, constitute le seul siège du commerce. Il n'y a pas de commerce permanent; le commerce périodique seul existe en fait et en droit."



peace belonged to these markets, and to give them a special protection, which tended to differentiate their government and their law from that of the country at large.[1] The church considered that it was bound specially to protect the poor and feeble; and this protection supplemented the special peace given by the king to the travelling merchant.[2] The church, again, tried to make men keep faith, and to insist upon testing the validity of commercial transactions by its own moral views; and the attempt to achieve these things has, as we have seen, had a lasting effect upon the history of commercial law.[3] Kings and emperors for a consideration made themselves the protectors of the merchants.[4] They encouraged the formation of markets, the peace of which was specially guaranteed. Special rules were made to facilitate their conduct, and to ensure the fulfilment of the transactions there entered into. When, as often happened, monasteries were granted the right to hold a market these two influences, ecclesiastical and lay, were exercised concurrently.[5] Seeing that the monasteries were often centres of production, the privilege of holding a market was particularly valuable to them. It enabled them to take the tolls of the market;[6] and other rights soon followed—the right to hold a court, to coin money, to exclude the royal officials.[7] All these privileges came to be summed up under the term "ban royal."[8] Other large landowners soon acquired similar privileges; and, as the central power decayed, this privilege of holding or creating a market was so extensively granted to or assumed by the feudal nobility that it was regarded as belonging to all lords holding a barony.[9] In France it was not till the royal power

[1] Huvelin, op. cit. 145, 338, 359.

[2] Ibid 155-157; in later law the idea that the merchants were "miserabiles personæ" still survived, and was put forward as a reason for allowing a short and summary procedure in mercantile cases, see Ansaldus, De Commercio, Discursus Generalis § 15.

[3] Above 80-81.

[4] See Huvelin, op. cit. 150-155 for the capitularies of the Carolingian kings; and Ibid 362-382 for the treaties made between merchant and king or lord for protection in return for a money payment; we see in these payments the origin of one of the tolls levied on the merchants under the name of *conductus*, *passagium*, or *travers*; and it survived, though the obligation to compensate those whose goods were stolen disappeared, ibid 379-380.

[5] Ibid 158—"L'influence de l'Eglise se fait encore sentir dans les concessions de marchés et des foires dont elle est le principal bénéficiaire."

[6] "Ces droits sont encore . . . uniquement des droits fiscaux."

[7] Ibid 162-167: the right to coin money was perhaps given because it was essential for the conduct of a business in a market, ibid 539-540.

[8] Ibid 167-168—"Le droit de juridiction et de coercition départi dans les nouveaux privilèges à leurs bénéficiares est compris sous le terme de *ban royal*. Le ban (bannus districtus, districtio) c'est, à l'origine, à la fois l'ordre du roi et la sanction de cet ordre. Plus tard, le même mot sert à désigner la puissance nécessaire à l'exécution d'un droit, puissance qui est le fondement de toute juridiction; il sert enfin à désigner le droit de juridiction lui même, et certaines de ses applications isolément."

[9] Ibid 183.

began, in the course of the thirteenth century, to encroach upon the powers of the feudal nobility, that the privilege of creating a market came to be regarded as an exclusively royal prerogative.[1] To these markets all commerce was as far as possible restricted, because this restriction facilitated the preservation of order, the collection of tolls, and the safety of the merchants.[2] Thus the market formed a liberty in which a justice, different from that of the ordinary courts, was administered as and when it was needed.[3]

In the course of the eleventh and twelfth centuries society was growing more settled; and, in the course of the twelfth and thirteenth centuries, we can see the growth of towns which, having acquired from the king or lord franchises of many varied kinds, fell apart from other communities.[4] We have seen that in England the origins of the boroughs are very various;[5] and the same variety is apparent on the continent.[6] But in most, perhaps in all cases, the town was the seat of a market. The traders who resorted to it were generally organized in gilds; and thus the way was prepared for the formation of a more permanent seat of commerce.[7] "The traders," as M. Huvelin has said, "become burgesses and the market becomes a town."[8] The temporary peace of the market becomes the permanent peace of the town,[9] and, similarly the court and the law of the market become a part of the permanent organization and the permanent law of the town. The resemblances between the market organization and the market law on the one hand, and the town organization and the town law on the other, show that this was in many cases the line of development. Thus: (*a*) in certain markets we see a body of *scabini* named by the lord of the market to assist him or his deputy in administering justice.[10] Similarly most towns had a council of *jurati* or *pares* or *scabini*, at first nominated by the lord, but generally in later days elected, which possessed a certain jurisdiction. This council came to

[1] Huvelin, op. cit. 185-187.

[2] Ibid 197-198.

[3] "Il y eut ainsi à côté des *tria placita legitima* du droit commun, une justice extraordinaire du marché qui s'exerca selon les besoins du moment. . . . La justice du marché est une justice particulière . . . elle est indépendante de toute autre justice pendant le temps du marché," ibid 193-194.

[4] Esmein, op. cit. 331-332.

[5] Vol. i 138-149.

[6] Esmein, op. cit. 338-340; Huvelin, op. cit. 212.

[7] Esmein, op. cit. 335-338.

[8] Op. cit. 218; "Les mots *cives*, *burgenses*, *mercatores* sont employés comme synonymes par les ecrivains et par les recueils juridiques. La même assimilation est faite entre les mots *civitas* et *villa forensis*: en effet la *civitas* n'est qu'une *villa* qui a le droit du marché," ibid 220.

[9] Ibid 221-228.

[10] Thus when in 1285 the government of London was taken into the king's hands, and put in charge of a warden, he held the court, and consulted with the aldermen; and similarly at St. Ives the lord held the court and consulted the merchants, see E.H.R. xxxvii 244-245.



consist of merchants who represented the various gilds; and they formed the beginnings of a commercial court.[1] (*b*) The right to seize a debtor's property without the judgment of a court was forbidden to those who were under the peace of the market; and we see a similar rule in favour of the burgesses of those towns which had originated from a market.[2] (*c*) The violation of the peace both of the market and of the town was punished by a double fine.[3] (*d*) Though the competence of the court of the town differed from the competence of the court of the market, in that it was a permanent and not a periodic court, and in that it sometimes acquired jurisdiction over the land on which the town was built, it resembled the market court in that it was in early days confined to contracts made and delicts committed within its geographical limits.[4] (*e*) Both the law of the market and the law of the trading burgesses who inhabited the town paid no regard to the status of the litigants—they applied to noble free and serf alike.[5]

Thus the ideas inherent in the periodic market, with its special organization and its special law, have helped to form a permanent market, and a permanent court administering a commercial law. It does not of course follow that these periodic markets ceased to be held. They did not all develop into municipal bodies; and, when they did so develop, they were often not the only cause which led to the growth of this permanent organization. Sometimes the right to hold a market was granted to a town;[6] and therefore in later law the market often existed separately from the municipal organization which had grown up around it, or to which it had been annexed.[7] But the market tended to become merged in the municipal organiza-

[1] Huvelin, op. cit. 234-236, 397; Esmein, op. cit. 349; Morel, op. cit. 97, says, "Le droit de marché a été l'embryon du droit commercial allemand; c'est à l'occasion des affaires du marché que les négociants ont commencé à prendre part à l'administration de la justice et si, au xiii^e^ et au xiv^e^ siècle, on les a jugés dignes d'entrer au conseil de ville et de remplir les fonctions d'échevin, c'est qu'ils avaient précédement montré leur sagesse et leur habileté dans le poste moins relevé de magistrat des foires."

[2] Huvelin, op. cit. 449, 450; see the charter of Soissons (cited ibid at p. 450), "Infra civitatis Suessionensis firmitates, alter alteri recte secundum suam opinionem auxiliabitur, et nullatenus patietur quod aliquis alicui eorum aliquid auferat . . . vel quidlibet de rebus ejus capiat."

[3] Ibid 227.

[4] Ibid 231-233; but later, and probably under the influence of the great international fairs this restriction disappeared, ibid 414; cp. vol. i 536 and n. 11; in England the older restriction was restored by a statute of 1477 vol. i 539.

[5] Huvelin, op. cit. 228-231.

[6] Thus Huvelin, op. cit. 173, points out that grants of market rights were given to Spires in 969, to Strasburg in 982, to Worms in 979, to Cologne in 973, and to Mayence in 975.

[7] "Dans la ville, il y a place non seulement pour le droit municipal (*jus fori*), mais encore pour le droit domanial, le droit ecclesiastique, le droit royal. La ville n'est pas habitée seulement par des bourgeois," ibid 229.

tion because the latter was better suited to the conditions of domestic trade in a more settled order of society.[1]

Thus we see the germs of a separate and a permanent commercial law. But as yet it was a law which depended largely upon the municipal constitution of the particular town. It is true that there are resemblances between these constitutions, due sometimes to direct borrowing,[2] sometimes to similarity of circumstances under which the town obtained its franchises; and this led to broad similarities in the law applicable to commercial transactions. For all that, the law was the law of a particular town or of a particular group of towns. There was nothing especially cosmopolitan about it.[3] It was not till the growth of the great international fairs, and the rise of the settlements of privileged associations of foreign merchants, that we can discern the beginnings of that cosmopolitan Law Merchant with which we are familiar.

(2) The fairs and the associations of foreign merchants.

Certain of the older markets had developed into towns and had become the centres of the permanent trade of a district. The growth of an international commerce during the twelfth and thirteenth centuries caused others to become large fairs of a type very different to that of the older markets. M. Huvelin has very clearly summed up the reasons for this development.[4] He says:—"when the superstitious fears of the year 1000 had passed away, when the invasions of strange tribes had ceased, when the definite establishment of feudalism had assured at least a relative security, a security which the church helped to render more stable—there was everywhere a renaissance of art, of thought, of business, and of society. The world took courage and commerce again began to flourish. . . . A decisive impulse was given by the crusades. From them we must date the habit of distant travel. It is they which opened the trade routes of the East, and thus created new markets for a cosmopolitan commerce. The Italians, enriched by foreign commerce, travelled over France, fairs were established on all sides, and great mercantile associations were formed. Owing to this series of peculiar

[1] "La marché n'est plus un organisme autonome, c'est un membre d'un organisme supérieur dont il depend," Huvelin, op. cit. 241.

[2] Esmein, op. cit. 346-347; Gross, The Gild Merchant i App. E; vol. i 528-529; cp. Tait, Study of Early Municipal History, Proceedings of the British Academy vol. x 11-12.

[3] Esmein, op. cit. 340, "Ce qui caractérise le droit municipal du moyen âge, c'est la particularité et la diversité. Chaque ville acquiert isolément ses privilèges et reçoit son organisation particulière; dans l'ensemble du *plat pays*, qui reste soumis aux rigueurs du régime féodal, ce sont autant d'îlots qui émergent et dont chacun a sa physionomie propre."

[4] Op. cit. 242.



circumstances the fairs attained a degree of prosperity which they had never attained before or since."

The chief of these fairs were established on the trade routes which ran from the north to the south of Europe.[1] It is for this reason that some of the most important of them are found in Champagne[2] and in Flanders.[3] Somewhat later we get great fairs in some of the German towns.[4] A little earlier we get a series of important fairs in Italy—but, as M. Huvelin has said, Italy attained a commercial civilization too highly advanced to preserve for long the form of a periodic trade. "The true Italian fairs are the fairs of France and especially the fairs of Champagne."[5] The fairs of Champagne began to decline during the fourteenth century, partly from political and partly from economic causes. The acquisition of Champagne by the French king involved it in the French wars of this century; and the heavy duties imposed by the king frightened away the merchants.[6] The trade between Flanders and Italy began to be conducted either by sea or along the Rhine valley;[7] and in the fifteenth and sixteenth centuries the fairs of Lyons began to take the place of the fairs of Champagne, because Lyons was a more convenient port for French foreign trade.[8] Other fairs which had an international importance in the fifteenth and sixteenth centuries were the fairs of Geneva[9] and Besancon;[10] and in Germany the fairs of Leipsic, Frankfort on the Main, and Cologne.[11] But already the age of fairs was passing. International commerce was becoming fixed permanently at certain centres; and in the course of the seventeenth century the international fairs became chiefly places where the bankers met to settle the payments for transactions concluded elsewhere. They had become not so much fairs as the clearing houses of Western Europe.[12]

[1] Op. cit. 243, "Les plus importantes d'entre elles sont établies sur une ligne qui va du Sud au Nord, de la Provence aux Flandres et à l'Angleterre, en suivant les vallées du Rhône, de la Sâone, de la Seine, de la Marne, de l'Oise, de la Somme, et de l'Escaut . . . D'autres groupements, plus restreints, sont disséminés dans toute l'Europe occidentale, et marquent les points de rencontre des voies commerciales fréquentées au xiie siècle."

[2] Ibid 244-254; the fairs of Champagne and Flanders form two types of fairs on which the franchises of other fairs were often modelled, ibid 243, 244.

[3] Ibid 258-266.

[4] Ibid 281, "Les foires d'Allemagne naquirent plus tard que les foires de France, et elles suivirent une évolution parallèle avec un siècle ou un siècle et demi de retard."

[5] Ibid 279-280.

[6] Ibid 255-258—as M. Huvelin points out, before Champagne was united to the crown of France it had formed "un marché neutre entre l'Italie, la Flandre, l'Allemagne, l'Angleterre, et la France."

[7] Ibid 257; Calendar of State Papers (Venetian) i *lxi-lxviii.*

[8] Ibid 258, 286-289.

[9] Ibid 289-290.

[10] Ibid 291-292.

[11] Ibid 299-300.

[12] For these fairs and the procedure followed at them see ibid 564-577; M. Huvelin, speaking of the period from the fifteenth to the seventeenth centuries, says,

But, though the great international fairs had passed away, their effects upon the growth of a uniform commercial law were permanent. In the fairs of Champagne merchants from all the countries of Western Europe met—many companies of Italians, merchants from all the cities of France and Flanders, Provencals, Jews, Englishmen, Scotchmen, Germans, Savoyards, and Spaniards.[1] In the fairs of Flanders, likewise, there were representatives both from the northern kingdoms, from the south of Europe, and from the East.[2] The men of all these different nations met and conducted their business under the same protection and the same law;[3] and, as that law developed to meet the new needs of this international commerce, the more finished legal conceptions of southern Europe inevitably exercised a constantly increasing influence upon the more primitive laws of the nations of northern Europe. That influence was exercised the more effectually because the companies of foreign merchants, either at these fairs or in their more permanent settlements, obtained in many cases the privilege of governing themselves and their transactions by their own laws. Thus the Italian Merchants, by treaty with Philip the Hardy, obtained in 1279, the right to nominate for themselves a captain, rector, and consuls.[4] The Provencal Merchants formed the "Societas et communitas mercatorum de Francia," the chief of which was nominated by the consuls of Montpellier.[5] The German merchants had their hansgraves, who decided their disputes while on their travels and during the fairs;[6] and the Hanseatic league got from the sovereigns of the various states of northern Europe in which they settled privileges, more or less extensive, of deciding their disputes by their own judges and their own laws.[7] This meant that, both in the fairs and wherever these associations of merchants settled, a uniform commercial law was to a large extent made and administered by the merchants for themselves.[8] Therefore the rules of law and the modes of administering it which were best suited to international trade could easily be

op. cit. 283-284, "Grace à la paix de plus en plus assurée qui règne partout, grâce aussi aux moyens de transport qui se perfectionnent, les foires, si elles gagnent peut être en importance absolue, perdent en importance relative. Les transactions qui s'y font, au lieu de constituer tout le commerce terrestre, n'en constituent qu'une fraction qui d'ailleurs diminue tous les jours. Les foires sont surtout, à cette époque, les centres de règlement d'affaires faites en dehors d'elles; ce sont les grandes places de paiement de l'Europe occidentale"; at Lyons, in the seventeenth century, the jurisdiction of the conservation of fairs was extended to all commercial transactions in or out of the fair. Huvelin, op. cit. 418.

[1] Ibid 250-252.

[2] Ibid 264-265.

[3] Ibid 258.

[4] Ibid 399; see Morel, op. cit. 82, 83 for the Italian consules missi and electi.

[5] Huvelin, op. cit. 398.

[6] Morel, op. cit. 119-123.

[7] Ibid 123-127.

[8] Ibid 88, 89.



adopted; and that obviously led to the speedy absorption of the legal machinery and the rules of law which had originated in those parts of Europe which were commercially and legally the most advanced. Thus the international commerce of the great fairs, and the activities of these privileged bodies of foreign merchants in the fairs and elsewhere, worked together to develop the commercial law of modern Europe. We can see their effects in three different directions—(i) in the removal of hindrances to trade imposed by national laws; (ii) in the rise of commercial tribunals modelled on the Italian plan; and (iii) in the spread of the Italian doctrines of commercial law.

(i) In order to attract merchants to the great fairs the state was prepared to forgo certain burdensome rights which, though profitable to itself, obviously hindered trade. Thus, the right of reprisals was suspended in respect of debts incurred or wrongs committed in the fairs.[1] The state abandoned, in favour of merchants coming to the fairs, the right of seizing the goods of a deceased foreigner (*droit d'aubaine*).[2] In some fairs the prohibition against usury was suspended in respect of transactions there entered into, provided that the interest charged did not exceed a certain rate.[3] In many cases the merchants attending the fair could not be arrested during the fair for wrongs done or debts incurred outside the fair.[4] The last mentioned franchise became an anachronism with the growth of a more settled order;[5] but the other privileges were gradually extended until they finally swallowed up the rules of law to which they had once been exceptions.

(ii) We have seen that in Italy and south-western Europe the growth of the special commercial courts presided over by the merchants was one of the main causes for the growth of an

[1] Huvelin, op. cit. 442-443.

[2] Ibid 443-445; in the treaty made in 1294 between the captain of the merchants of Italy frequenting the fairs of Champagne, and Otto count of Salins (cited ibid 444), it is provided that, "Si aliquis istorum mercatorum obierit in terra et jurisdictione nostris . . . nos bona ipsius consignari faciemus, et reddi ejus nuntio vel socio de quibus constiterit aut nuntio universitatis dictorum mercatorum aut capitanei, quam cito postulatum fuerit a nobis vel ballivo nostro. . . . Sed ille qui bona receperit voluntatem defuncti exequatur;" as Pardessus, op. cit. iii *clxxviii*, says, "On ne peut nier les services importans que rendirent dans le Nord la grande association anséatique, et dans le reste de l'Europe les compagnies moins celebres . . . des commercans italiens," in respect of the removal of many kinds of burdensome exaction.

[3] Ibid 439-440; a royal ordinance of 1311 fixed the limit for the fairs of Champagne at 15 p.c.

[4] Ibid 445-451; at p. 447 the charter of Aix la Chapelle of 1166 is cited to the effect that, "Nullus mercator vel quilibet alia persona in his nundinis mercatorem in causa ducat pro debito solvendo vel alio quolibet negotio quod ante nundinas perpetratum factum fuerit; sed si nundinis aliquid perperam factum fuerit, in nundinis secundum justiciam emendetur."

[5] Ibid 451-454.

adequate commercial law.[1] But in northern Europe the privileges of the merchants depended upon a grant or grants made by king or lord.[2] These grants resulted in the formation of a franchise of fair or market in which the merchants were governed by a special law. But the administration of the law has always been a profitable thing; and therefore the grantee of the franchise naturally kept it in his own hands. It was therefore the lord of the fair or market, and not the merchants who resorted to it, who was the judge of the court; and the assessors of the court were chosen by him. We have seen that when the periodic market developed into a permanent town these assessors developed in many cases into a permanent court of merchants.[3]

In the case of the great fairs the mode in which a commercial court of merchants was developed was different. It apparently took its rise from the large powers which the corporations or associations of foreign merchants, who came to the fairs, were allowed to exercise over their own members.[4] The growth of the idea that merchants were best fitted to exercise a mercantile jurisdiction over merchants can be seen in the history of the fairs of Lyons, which date from 1419—a time when the fairs of Champagne were already declining. An ordinance of 1463 vested the jurisdiction in a royal official called the "conservator and guardian of the privileges of the fairs." But in the following year another ordinance allowed the municipality of Lyons to elect a suitable "prud'homme" to see that the merchants suffered no extortion, and to compose their differences either by agreement or by the arbitration of two sufficient merchants.[5] A struggle of nearly two centuries lay before the merchants of Lyons before they succeeded in absorbing the jurisdiction of the conservator.[6] But, before the date, the principle that commercial courts should be presided over by merchants, and that the merchants should have as much or more weight than the lawyers, had been generally accepted throughout Europe. In the great commercial centres of Flanders, and in the cities of the Baltic states,[7] the merchants had instituted the kind of tribunals best suited to their needs. In Spain the consular jurisdiction spread from Aragon to the other cities of the peninsula.[8] In France the inconvenience caused

[1] Above 68-71.
[2] Above 87-88.
[3] Above 88-89.
[4] Huvelin, op. cit. 394-402.
[5] Ibid 404, 405; Morel, op. cit. 169, 170; as M. Morel points out, loc. cit., the royal official had the largest share of jurisdiction; the decisions of the prud'homme were subject to appeal, and that gave the royal official the last word.
[6] Ibid 172-180.
[7] Marquardus iii, i 31-34 points out that in the Baltic states there were formed, after the model of Lubeck, many "Collegia nautica sive mercatoria in quibus controversiones mercatoriæ et nauticæ deciduntur"; Ansaldus, op. cit. Discursus Generalis § 3.
[8] Mitchell, op. cit. 64; above 70-71.



by the clashing jurisdiction and complicated procedure of the ordinary courts[1] caused this jurisdiction to prevail in spite of the opposition of those courts. In 1549 an exchange, and a consular court staffed by judges elected by the merchants, were established at Toulouse.[2] In 1563 L'Hopital established similar courts at Paris;[3] and in 1576 they were established in the principal towns and the capitals of the provinces, in which an extensive trade was carried on.[4] In Germany the preponderating influence of the merchants in the government of some of the principal towns had led to the beginnings of a commercial jurisdiction; and the ordinary courts and the law which they administered were adapted to the needs of commerce.[5] But the Reception of Roman law in many cases superseded the ordinary law, and led the ordinary courts to become the preserves of the lawyers, who naturally adopted the technical and complicated procedure of the civil law.[6] This did not suit the merchants. They had recourse, sometimes to the extra-ordinaria cognitio of the Burghermaster,[7] sometimes to special tribunals of arbitration.[8] In 1508 Nuremburg was enabled by imperial grant to set up a commercial court of merchants for merchants;[9] and later in the century other towns which, like Nuremburg, possessed large fairs got similar privileges.[10] But the German development was slower than the French. It was not possible in Germany, as it was in France, to make sweeping and general changes by legislative ordinance. Leipsic obtained a commercial court in 1682; and by that time the type of German commercial court was fixed. The influence of the towns and the influence of the international fairs had combined to produce this result.

It is hardly necessary to say that the constitution of these commercial courts was not precisely the same in all these different countries. In particular the terms of the partnership

[1] Morel, op. cit. 189-192; Henry II.'s edict of 1551 cited at pp. 191-192 states that the length and technicalities of the process of the ordinary courts was so great, "De sorte que la pluspart de nos subjects délaissans et abandonnans leur forme et manière de vivre avec leurs arts . . . employent le temps de leur vie à la poursuite d'un procez, sans en pouvoir voir la fin, et consument leurs meilleurs ans, avec leur biens, facultez et substances, en chose si serve et si illibérale qu'est cette occupation comme chacun sçait"; besides there were the delays caused by the conflicting jurisdiction of various courts.
[2] Ibid 192.
[3] Ibid 195-202; cf. Glasson, Les Juges et Consuls des Marchands, Nouv. Rev. Hist. (1897) 5-13.
[4] Morel, op. cit. 203, "Dans les principales villes et capitales des provinces èsquelles il y avait grand train et trafic de marchandises."
[5] Ibid 97-101.
[6] Ibid 102-105.
[7] Ibid 105-106.
[8] Ibid 106-109.
[9] Ibid 109-111; as M. Morel points out we may suspect that this reform was directly inspired by the example of the cities of Lombardy, between which and the towns of lower Germany there were intimate commercial relations.
[10] Ibid 112-115.

between the lawyers and the merchants were different in different places.[1] But they all had this essential feature in common—the merchants were part of the court. Moreover, in most cases, the part which the lawyers were allowed to take, either as advocates or judges, was restricted;[2] and in all cases—both in the courts of the fairs and in the courts of the great cities—the procedure was short and summary. All over Europe it is described in the same terms as it is described in the Italian city statutes—it is *de plano ac sine figura et longo strepitu judicii.*[3]

(iii) We must now turn to the third of our divisions—the spread of the Italian principles of commercial law.

Since the great international fairs were the centres of European trade, special rules of law were needed to regulate the complicated transactions incident to such a trade. Already rules of law adapted to such transactions had been evolved in the Italian cities and the great trading centres of South-western Europe.[4] It was through the fair courts that these rules of law were spread over the rest of Europe. As M. Huvelin has said, we must recognize with Goldschmidt that the fairs were the meeting-places of the Roman and Germanic worlds of commerce and law.[5] No doubt the associations of privileged foreign merchants, which settled in the different European countries, helped both at the fairs and elsewhere to spread these ideas. But it is of the transactions of these great fairs that we have the fullest information; and it is from them therefore that we can see most clearly the manner in which our modern rules of commercial law have grown up. Let us take one or two examples from the rules of law applied in the fairs of Champagne.

Firstly, dealings in money and the mechanism of exchange. In the fairs of Champagne money from all the states of Europe was in circulation.[6] The money changers (*campsores*) carried on an active trade.[7] They fixed the rate of exchange; and

[1] Morel, op. cit. 212-213, "Durant tout le Moyen Age, en Italie, pas de juridiction commerciale où les juristes ne fussent mélangés aux négociants. Des Marchands et rien que de marchands pour juger les marchands, tel est au contraire le principe fondamental que les ordonnances françaises suivent avec une rigueur de plus en plus accentuée à mesure qu'on rapproche de xvie siècle. Quant a l'Allemagne, elle n'applique intégralement, ni le système italien, ni le système français."

[2] Glasson, op. cit. 21; but later certain persons were allowed to practise before these courts, without the title of avocat or procureur, under the name of persons "agréés par messieurs les consuls pour porter la parole a l'audience"; in consequence many of the advantages of this procedure disappeared, ibid 22; cf. Huvelin, op. cit. 419.

[3] Cf. ibid 418, 419.

[4] Above 72-85.

[5] Op. cit. 258.

[6] Ibid 540-541.

[7] "Le nom de *changeurs*, qui est primitivement l'équivalent du nom de *marchands*, designe, dans l'usage du moyen âge ceux des marchands qui se consacrent plus spécialement au commerce des métaux précieux et au commerce du crédit," ibid 543; apparently the word *change* meant the booth or bench of the merchant, ibid 546.



their dealings in money naturally led them to develop a banking business.[1] The establishment of such a business led to the evolution of Bills of Exchange and other negotiable instruments, which facilitated the payment of debts without the need for transporting coin.[2] The presence of these changers and bankers at the fairs made it a convenient practice to make debts of many kinds payable at the fairs.[3] The fairs thus became the clearing houses of Europe;[4] and, as we have seen, it was this function of the fairs which has had the longest life.[5] The Italian influence upon these branches of the law is particularly direct, since the business of dealing in money or its substitutes was chiefly in the hands of the Italians.[6] Thus, through the fairs, the Italian doctrines as to banking, negotiable paper, and international exchanges, were diffused throughout Europe, and became the foundation of its commercial mechanism.

Secondly, the Italian doctrines as to the unlimited liability of the members of a societas for the acts and transactions of one of its members, though the member was not specially authorized, was recognized in the fairs; and through them they passed into the commercial law of Europe. This principle gradually supplanted both the Roman and the Germanic rules which did not admit such a liability.[7]

Thirdly, we have seen that the prohibition of usury was relaxed in favour of those who traded at fairs provided that the rate of interest did not exceed a certain sum,[8] and that the Italian cities found it necessary to make similar modifications of this prohibition.[9] We shall see that, from the sixteenth century onwards, usury laws on these lines were adopted by the commercial cities and states of Europe.[10]

Fourthly, the fairs of Champagne recognized a procedure against defaulting debtors at the fairs, which recalled the provisions of some of the Italian city statutes, and foreshadowed a modern bankruptcy procedure. It enabled, in the first place, the debtor to be arrested and his good seized; and in the second place, it distributed his assets rateably among all the creditors whose debts had been contracted at the fair.[11] Other creditors only came in after the fair creditors had been satisfied.[12] Provision was made for compositions with creditors.[13] Other fairs applied a like set of rules; and, at a later period, their example

[1] Huvelin, op. cit. 543; vol. viii 177-192.

[2] Vol. viii 113-177

[3] Huvelin, op. cit. 556.

[4] Ibid.

[5] Above 91.

[6] Huvelin, op. cit. 544.

[7] Mitchell, op. cit. 132-135; Huvelin, op. cit. 484-485.

[8] Above 93.

[9] Above 80 n. 2.

[10] Vol. viii 100-107.

[11] Huvelin, op. cit. 487-488.

[12] Ibid 493-494.

[13] Ibid 494-495.

helped many countries to substitute a rational law of bankruptcy for primitive rules as to execution for debt which were wholly unsuited to the needs of merchants.[1]

Fifthly, the judgments given in the courts of the fairs had an international force. If the courts of any particular country refused to recognize them, the merchants of that country were forbidden to come to the fairs (*défense des foires*)—an expedient which generally succeeded in securing the co-operation of the national courts.[2] Just as in the rules made by the Italian cities for the decision of questions in which a foreign element is present we can see the germs of some of the rules of private international law,[3] so in this rule we can perhaps see one of the causes which has led to the growth of that department of private international law which is concerned with the validity of foreign judgments.

Sixthly, the rules laid down by the fair courts as to purchases from a non-owner have had large effects direct and indirect upon our modern commercial law. In these rules, originating in commercial necessity, and developed by the canonists' views as to the importance of good faith, we can see the growth of a set of doctrines which have not only modified the older rules as to an owner's rights to recover his chattels, but have also added to our commercial law one of its most important chapters.

We have seen that originally our English common law, which here followed faithfully the Germanic tradition, allowed the owner, whose property had gone from his possession against his will, to recover it from anyone in whose possession he found it; while, on the other hand, if he had voluntarily parted with possession (e.g. by bailment) he had no action save against his bailee.[4] The latter part of the rule was modified, certainly as early as the first half of the fourteenth century, so as to give the owner a remedy against anyone who detained his chattel, even though he had voluntarily parted with it.[5] In continental states the influence of the Roman conception of *dominium* and its consequences led to this modification of the older law;[6] and in

[1] Huvelin, op. cit. 495-498; below 135-136, 137, 139, 150; vol. viii 229-233.

[2] Ibid 426-434; the international validity claimed for the judgments of the fairs of Champagne is illustrated by a correspondence in 1299-1300 between the Guardians of these Fairs and the Lord Mayor of London, printed by C. Walford, Fairs Past and Present 250-260; the Lord Mayor had taken upon himself to examine the facts on which the judgment was based; the Guardians of the Fairs in 1300 explained that this was irregular because "the cognisance of what relates to fairs belongs to no judge, but to us only"; and that if the mayor made default they must "inhibit the land and fairs of Champagne and Brie to all your subjects and their goods," at p. 257; cf. E.H.R. xxxvii 247.

[3] Above 74-75.

[4] Vol. ii 79-80; vol. iii 319-322, 324-327, 336-337; cf. Huvelin, op. cit. 456-457.

[5] Vol. iii 324-327.

[6] Huvelin, op. cit, 464.



England the same influence led to extensions of the scope of the older personal actions with the same results.[1] But before this modification had taken place in continental states an exception in favour of the purchaser in a market had been established.[2] This exception seems in France to have passed through two stages. At first the purchaser's title to the goods was secure; but later he was bound to restore if he were re-imbursed the price which he had paid.[3] Later still a further condition was added. The canonist view of the importance of good faith, which did so much for the development of commercial contracts,[4] led to the adoption of the rule that it was only the bona fide purchaser in a market who could claim this privilege.[5] Hence we get the rule, either in the form that the former owner cannot recover at all from the bona fide purchaser, or in the form that he can only recover if he is willing to pay the price which the bona fide purchaser has paid. This rule formed an exception both to the old rules which allowed an owner who had involuntarily lost possession to recover from any third person, and to the new rules which allowed him to recover when he had voluntarily parted with possession.[6] This exception in favour of bona fide purchasers in a market still forms part of modern codes of commercial law;[7] and it is perhaps the earliest illustration of that recognition of the claims of the bona fide purchaser, which the exigencies of a highly organized commercial system have compelled the law to concede.[8]

In these various ways we can trace the influence of the law administered in these international fairs upon the growth of our modern law. A similar influence was exercised by the associations of foreign merchants who settled in the various European states. They familiarized the merchants of those states with the legal doctrines I have just described; and these influences tended to give to the commercial law of Europe its modern cosmopolitan character. The books of the writers of the seventeenth century show that Italian, Flemish, French, and Spanish authors could be cited by the writer of any nation to illustrate or to prove the doctrines which he was expounding.[9] Far more truly than in

[1] Vol. iii 339-341, 347-349.

[2] Huvelin, op. cit. 460; Mitchell, op. cit. 97, 98.

[3] Huvelin, op. cit. 460-461.

[4] Above 80-81.

[5] Huvelin, op. cit. 462.

[6] Ibid 463-464.

[7] Ibid 465, citing Art. 2280 of the French Code Civil; below 105, 110-111 for the English development.

[8] Cf. Mitchell, op. cit. 102; below 105 n. 1.

[9] A very cursory inspection of the books of Marquardus or Ansaldus will show this; two of the earliest of these writers were Straccha, and Pedro Santerna Lusiterna, whose works were printed in 1556, Desjardins, op. cit. 104, 108; they are cited by all their successors; thus Marquardus ii 13. 4 refers to them as the founders of insurance law.

the Middle Ages the commercial law of Western Europe had become a jus gentium which "apud omnes populos peræque custoditur."

We shall now see that the growth of international commerce was producing a similar degree of uniformity in the principles of the closely allied topic of maritime law.

*Maritime Law.*

The early history of maritime law is somewhat different from the early history of commercial law. In most of the European countries which possessed seaports and a coasting trade the customs of the sea were codified from an early date, and these customs applied to a group of ports. We have seen that the Consolato del Mare, the laws of Oleron, the laws of Wisby, and the laws of Lubeck formed a series of codes which governed all the various maritime states of Europe.[1] Thus in the earlier Middle Ages maritime law was more cosmopolitan in its character than commercial law. There was more variety between the customs of towns in different parts of Europe than between the customs prevailing in the different seaports. This is due to two sets of causes. In the first place, the problems which a body of maritime law must solve are in all ages very similar. Some of the topics dealt with in the laws of Oleron appear in most of the other codes. The duties of the mariners, the power of the master, jettison, contribution, average, salvage, collision, loading, freight —are topics which must occur so soon as any sort of sea borne trade arises. Moreover the conditions under which this trade was carried on were stable as well as similar. "Between the ninth and the thirteenth centuries," says Mr. Ashburner, writing in 1909, "there was probably less change in the conditions of commerce and navigation than there has been in the last twenty-five years."[2] In the second place, sea borne trade means communication between places comparatively distant, and geographical conditions limit the number of these places. These facts tend to produce a similarity of rule because it is easy for one port to imitate the customs of another port. They tend also to make a codified set of rules convenient because they enable the foreign merchant to understand his legal position.

But, though there are these differences between the maritime and the commercial law of the Middle Ages, the intimate connection between these two branches of law has caused the manner in which they were administered, and the manner in which their rules were developed, to be very similar.

We have seen that in the trading centres of the south of

[1] Vol. i 527-528.

[2] Ashburner, op. cit. cxv.



Europe the mode in which maritime law was administered was similar to the mode in which commercial law was administered.[1] At Barcelona the prud'hommes of the sea administered maritime law, just as the prud'hommes of the merchants administered commercial law; and in the Flemish ports, and other ports in northern Europe, this method of administering the law was followed.[2] But this method was not followed so universally in maritime as in commercial law. In France, just as in England, jurisdiction over maritime cases was vested in a court of Admiralty; and in France as in England this division of functions produced conflicts of jurisdiction.[3] In France the Admiralty and the commercial consular courts often differed as to their competency to exercise jurisdiction, just as in England the Admiralty and the common law courts differed. But the results of the conflict were very different in the two countries. While in England the Admiralty was deprived of practically all its jurisdiction over commercial cases,[4] in France it retained an exclusive jurisdiction over all those commercial cases which involved carriage by sea.[5]

But this difference in the mode in which maritime law was administered did not prevent a growing similarity in the principles of that law. We have seen that the commercial activities of the trading centres of the south of Europe caused the growth of elaborate bodies of maritime law.[6] These bodies of law contained minute regulations upon topics which were either but scantily treated or were not treated at all in the codes of northern Europe. The contract of marine insurance is as we shall see a striking example.[7] It was inevitable that these bodies of law should be used in the sixteenth century by the seaports which, owing to the trade with the Indies and America, had taken the place of the seaports of the Mediterranean.[8] It is true that, in the case of those branches of maritime law which touched upon international questions, the nations differed. Selden advocated a mare clausum and Grotius a mare liberum.[9] But, in the case

[1] Above 70-71.

[2] Malynes, Lex Mercatoria Pt. III. chap. xvi.

[3] Pardessus, op. cit. iv 226-227.

[4] Vol. i 553-558.

[5] Pardessus, op. cit. iv 327—the ordonnance of 1681, after enumerating a long list of matters which fell under the jurisdiction of the court of Admiralty, ends by giving it jurisdiction, "generalement de tous contrats concernans commerce de la mer, non obstantant toutes sousmissions et privileges au contraire."

[6] Above 76-77.

[7] Vol. viii 274-283

[8] This was effected partly by legislation—thus we have an elaborate ordinance of 1552 for Spain, Desjardins, op. cit. 105; a maritime code in 1561 for Denmark and Norway, ibid 117; and for France a comprehensive edict in 1584 as to the jurisdiction of the Admiralty, ibid 121, 122; partly by the works of authors like Straccha, ibid 104, Santerna, ibid 108, and Wertsen, ibid 113-114, who wrote in the sixteenth century; and by Grotius, above 55, Marquardus, Desjardins 164, and many others, ibid 165, 166, who wrote in the seventeenth century.

[9] Above 10-11.

of the much larger body of rules of maritime law which touched upon commercial questions, the growing similarity between the commercial laws of the various states of Europe intensified the similarity which already existed between their maritime codes. In the case of maritime as in the case of commercial law the treatises of the European jurists possessed an authority which was international.

In these various ways principles and rules of commercial and maritime law, which had originated in the Italian cities and the trading centres of the south of Europe, were received by many other states, and became the basis of their commercial and maritime law. But it is time to return from our wanderings in foreign lands, and with the help of the information we have gained to examine the effect of these widespread changes and developments upon our English law.

*The Beginnings of English Commercial and Maritime Law*

The origins of some of the doctrines of English commercial and maritime law can be traced back to the Middle Ages; but by far the larger part of our modern commercial and maritime law is due to the reception of continental doctrines in the sixteenth and seventeenth centuries. In the case of commercial law this reception was effected partly by the legislature, partly by the Council, and partly by the various courts of law which had jurisdiction in mercantile cases—the Admiralty, the Chancery, the Star Chamber, and the courts of common law. Through these various agencies many new legal doctrines, familiar in the trading centres of Europe, became part of English law, and began to be developed on native lines by the English courts. In the case of maritime law this reception was effected mainly through the court of Admiralty. This court was well established in the sixteenth century, and had already begun to lay the foundations of English maritime law.[1] But naturally its importance and the sphere of its jurisdiction were enlarged by the commercial expansion of the latter part of the sixteenth century.[2] It too began to apply some of those doctrines, both of maritime and commercial law, which had been evolved in foreign lands, and to incorporate them into English law.

The history of the technical development of some of the most important of these doctrines of commercial and maritime law I shall relate in the second Part of this Book. In this chapter I shall describe shortly the mediæval beginnings of English commercial and maritime law; the agencies by means of which the

[1] Vol. i 552-559.

[2] Ibid 546-547.



continental doctrines were received into our law during this period; and the characteristic peculiarities arising from the manner of their reception, which begin to appear in our commercial and maritime law during this period, and become more fully developed in the next. My division of the subject will therefore be as follows: (1) The Mediæval Law Merchant in England; (2) The reception of the foreign doctrines of commercial and maritime law; and (3) The peculiarities in the development of English commercial and maritime law.

(1) *The Mediæval Law Merchant in England.*

*Commercial Law.*

In England, as on the Continent,[1] the need for providing a special protection for the merchant and for trade led the legislators of the ninth and tenth centuries to confine trade to definite centres. In Saxon times we meet with laws which, if they did not confine trade to the "burh" or "port," made it a risky business for the purchaser to buy elsewhere, in case the goods turned out to have been stolen.[2] This limitation of trade to special places which were specially protected, naturally led in England, as elsewhere, to the growth of permanent centres of commerce.[3] It was only in these "ports" or "burhs" that money could be coined;[4] and the market which arose under this special protection was one of the causes which gave to the borough community features which distinguished it from the other communities which made up the English state.[5] "The general logic of the process," says Maitland,[6] "we take to have been this: the king's *burh* enjoys a special peace: even the men who are going to or coming from it are under royal protection: therefore within its walls men can meet together to buy and sell in safety: also laws which are directed against theft command that men shall not buy and sell elsewhere: thus a market is established: traders begin to build booths round the market-place and to live in the borough." In England as abroad the king expected to be compensated for the special privileges there enjoyed. The traders must pay toll; and this right to toll

[1] Above 86-87.

[2] Maitland, Domesday Book and Beyond 194, and references to the Anglo-Saxon Laws cited ibid n. 1; Borough Customs (S.S.) ii lxxiv-lxxv; and cf. Tait, E.H.R. xii 774; Nottingham Records i 1, cited P. and M. i 634 n. 3; Stone, The Transaction of Sale in Saxon Times, L.Q.R. xxix 331-332.

[3] Stone, ibid 326-330 suggests that it is the port rather than the burh which is associated with the rise of the permanent market.

[4] Maitland, op. cit. 195.

[5] Ibid 195, 196; E.H.R. xii 774; vol. i 139; vol. ii 387-389.

[6] Domesday Book and Beyond 192-193.

is one of those franchises which were so freely granted by the Anglo-Saxon kings.[1] Thus, in England as abroad, the right to hold these markets, and even the right to confer the privileges of a burh upon a community, passed into the hands of the great landowners;[2] and they were not generally recognized as belonging solely to the crown till after the Quo Warranto inquiries of Edward I.'s reign.[3]

By that time it had become clear that the two chief centres of commerce were (i) the boroughs, and (ii) the chartered fairs. We have seen that both these centres had courts in which the Law Merchant was administered.[4]

(i) Some illustrations have already been given of the way in which the customary law administered in the boroughs adapted itself to the needs of the trader.[5] We have seen that special rules relating to apprentices, to the liability of masters on their servant's or agent's contracts, to the capacity of a married woman who was a trader, to the forms and enforceability of contracts, can be traced to the fact that the borough was a mercantile community. Some boroughs provided an especially speedy process where one of the litigants was a foreign merchant;[6] and a jury half-native half-foreign was sometimes allowed in such cases.[7] Special rules were made where one of the parties to a suit wished to rely upon a document which at the time of action brought was in a foreign country.[8] Although the borough court could not, as a rule, entertain actions which arose outside its territorial limits,[9] it was in some cases, provided that it should have this jurisdiction if the cause of action were a trade contract or arose as between foreign merchants.[10] In some boroughs we meet with various sets of rules which aimed at protecting the honest pur-

[1] Domesday Book and Beyond 194; vol. i 19-20.
[2] Ibid 140. [3] Ibid 87-90. [4] Ibid 535-540.
[5] Ibid 536-537; vol. ii 387-389; vol. iii 387; see also Law Merchant in London, E.H.R. xxxvii 242 seqq. for some details as to the London courts.
[6] Vol. i 537 n. 1; and Borough Customs (S.S.) ii 183-184 there cited; cf. E.H.R. xxxvi 242-243.
[7] Borough Customs (S.S.) i 201—citing the London Liber Albus i 292; ii 191, 192.
[8] Liber Albus (R.S.) i 212, 213; and these rules were borrowed by Lincoln, Borough Customs (S.S.) i 207.
[9] Vol. i 149; cf. E.H.R. xxxvii 246-247.
[10] Liber Albus (R.S.) i 215, 216, "Item, en pleyntes de dette et accompt, et autres personels contractz faitz parentre marchaunt et marchaunt, si le pleintif counte que le defendaunt a ascune ville marchaunt, ou en lieu marchaundable deinz le roialme, bargana ou achata de mesme le pleintif ascuns marchaundises, ou receust ses deniers pour luy paier, livrer, ou eut rendre accompte en ascun lieu deinz la citee de Loundres; en tiel cas, le defendaunt par usage serra mys a respounder, nient contrusteaunt que le contrait se fist hors de la citee"; there is a similar provision at Cork about 1339, Borough Customs (S.S.) i 213, 214; for the same rule in the case of the fair courts see vol. i 536 n. 11; above 89 n. 4.



chaser of stolen goods;[1] but these borough rules, except in the city of London, did not become a permanent part of English law. It was only upon an honest purchaser in market or fair,[2] that the common law conferred any such privilege; and by Edward IV.'s reign the London privilege had come to be based on the assumption that all shops in the city of London were market overt for sales effected by the shopkeepers.[3] This privilege has, from the end of the sixteenth century, been strictly limited to sales in the shop by the shopkeeper of the articles in which he deals.[4] It does not apply to sales not in the shop, or to sales to the shopkeeper;[5] and it only applies to bona fide purchasers.[6] Neither in borough nor in fair does there appear to have been any liability for the deficient quality of goods sold, except by virtue of an express warranty.[7]

But though commercial needs sometimes influenced the jurisdiction and procedure of the borough courts, and inspired certain of the rules of law laid down by them, commercial law does not, as Miss Bateson has pointed out, hold a large place in the borough custumals. "Merchant law," she says,[8] "appears in these codes as only a subsection, chiefly interesting to the clerk of the borough court for the forms of its piepowder court, its rapid procedure, its arrangements for the foreigner, and the trader travelling from place to place. That our custumals have so little to tell of the rules of hosting and brokerage, of the beginnings of the negotiable instrument, or the responsibilities of partnership, of rules concerning the delivery of goods, of owners'

[1] Borough Customs (S.S.) ii lxxvi-lxxviii—Miss Bateson says of these rules, "The borough law of bona fide purchase was not the uniform international merchant law which was tending to grow up on this subject, in protection of the possessor's claim against that of the loser of the goods, but a law developing here in one way and there in another, according to the circumstances in which the borough was placed."
[2] See below 110-111 for the treatment of this subject in the fair courts.
[3] Y.B. 12 Ed. IV. Pasch. pl. 22, where it was claimed that, "La Cite de Londres est auncien City de temps d'ont memory etc. et ad estre un market chescun jour en le semaigne pour touts hommes de vendre etc.;" cf. Y.B. 33 Hy. VI. Hil. pl. 15.
[4] "Every shop in London is market overt for such things only which by the trade of the owner are put there to sale; and when I was recorder of London I certified the custom of London accordingly. Note Reader the reason of this case extends to all markets overt in England," *per* Coke, the case of Market Overt (1596) 5 Rep. 83 b; this case is reported also in Popham 84, 1 Anderson 344, Cro. Eliza. 454, and Moore 360; the best modern account of this custom will be found in Scrutton J.'s judgment in Clayton v. Le Roy [1911] 2 K.B. at pp. 1038-1045; he points out at p. 1041 that the custom "is confined to open sales in shops of goods usually sold there, and in the time of Elizabeth importance was attached not only to the sale being in an open part of the shop, but to the sale being visible to passers by in the street."
[5] Hargreave v. Spink [1892] 1 Q.B. 25; Clayton v. Le Roy, last note.
[6] Y.B. 33 Hy. VI. Hil. pl. 15.
[7] Borough Customs (S.S.) ii 182, 183, citing the customs of Grimsby (1259), Exeter (1282), and Lancaster (1562); the Berwick Gild Statutes, cited ibid 182, seem to make the seller liable if he has been guilty of fraudulent concealment.
[8] Borough Customs (S.S.) ii lxxxv.

risk, of negligence, of covenant or account, seem to show that if market law could once claim a big share in the making of borough law, the large commerce of a later time was sending its stock of legal ideas into another channel." It is therefore to the piepowder courts of the fairs, and to the courts of the staple, rather than to the courts of the boroughs, that we must look, if we would trace the development of commercial law in England in the Middle Ages.

(ii) I have already spoken of the court of piepowder which was incident to the franchise of fair. We have seen that this court was held both for those fairs which belonged to particular lords, and for the fairs which were held by the boroughs.[1] Many records of these piepowder courts exist; and it would seem that the existence of these records is peculiar to England. The records of the great continental fairs, if they ever existed, have not come down to us.[2] Gross has published a selection of these records; and Maitland has published some of the records of the fair court of the Abbot of Ramsey held at St. Ives in Huntingdonshire.[3] These are the only records yet published; but we get some further information, both as to the character of the court and as to the law there administered, from the custumals of some of the boroughs,[4] and from the unique treatise on the Law Merchant contained in the Red Book of Bristol.[5]

It is clear from these authorities that these piepowder courts were of the same general type as the fair courts of the Continent.[6] I have already described their leading characteristics.[7] Here I must note some of the peculiarities of the law therein administered.

The idea that the law must be administered speedily and summarily, which is common to all mediæval commercial courts throughout Europe,[8] took practical shape in many relaxations of the ordinary rules of procedure. "Pleas were begun without a writ, formalities were assuaged, few essoins were allowed, and an answer to the summons was expected within a day, often indeed within an hour. Pleas were adjourned from hour to hour and from day to day. . . . If the defendant failed to appear when summoned, his goods were attached forthwith, appraised, and sold."[9] In London an attempt was made to restrict appeals in

[1] Vol. i 537-538.
[2] Gross, Select Cases on the Law Merchant (S.S.) i xv, xvi.
[3] Select Pleas in Manorial Courts (S.S.) 130-160.
[4] See the munimenta Gildhallæ (R.S.); and the two volumes of Borough Customs (S.S.).
[5] Vol. i 529, 539.
[6] Above 92-93.
[7] Vol. i 535-540.
[8] Above 81-83, 96.
[9] Gross, Select Cases on the Law Merchant (S.S.) i xxvi; and cf. the authorities cited ibid xxv, xxvi.



order that vexatious delays might be avoided;[1] and the emancipation of these courts from the ordinary technicalities of procedure sometimes gave rise to developments which were in advance of the contemporary rules followed by the courts of common law. The general rule that the party, plaintiff or defendant, who failed to prove his claim or plea, paid the costs;[2] the communications maintained between the courts of different fairs, whether in England or abroad; and the respect paid to the judgments of their courts[3]—are good illustrations. But perhaps the most interesting of these developments is the manner in which in certain places the plaintiff's secta was developing into a body of witnesses who were examined by the court in a very modern fashion.[4]

The records of the fair courts show us that the parties might either have their case tried by a jury,[5] or by the old method of compurgation.[6] If they elected the former method (as they usually did) matters proceeded as at common law. If they elected the latter method the Red Book of Bristol,[7] and a case of 1428 which occurred in the court of the staple of Exeter,[8] show that the formal compurgation was disappearing, and that the proof really turned upon an examination of the plaintiff's secta. The secta was treated as a body of witnesses.[9] They were examined by the court, and were examined apart from one another if there was any reason to suspect fraud or collusion.[10] At the same time

[1] Borough Customs (S.S.) ii 192 (1419), citing Ricart's Kalendar 100; but the author of the Bristol Treatise seems to contemplate the possibility of proceeding by a writ of trespass in the royal courts for the giving of an irregular or unjust judgment, Red Book i 70—a mode of procedure which looks as if the author had not yet distinguished a complaint against a judge from a complaint against his decision, vol. i 213-214; the common law courts certainly heard such appeals, see e.g. Plac. Abbrev. 321.

[2] "Et sciendum quod quicunque cadat sive querens sive defensor semper cadit in damnis et expensis illius pro quo judicium redditur," Red Book of Bristol i 66; and see also ibid pp. 65, 67; for the common law rules see vol. iv 536-538.

[3] Vol. ii 393; above 98; Red Book of Bristol i 80-85.

[4] For the secta and for the old ideas as to proof and procedure, see vol. i 300-301.

[5] It would seem that, in London at any rate, the jury must be a jury of merchants, E.H.R. xxxvii 245-246.

[6] There are many instances of trial by a jury in Gross, Select Cases on the Law Merchant (S.S.); see e.g. at p. 53; for instances of compurgation which, in civil cases, are fewer in number, see ibid pp. 90, 97; Red Book of Bristol i 69.

[7] Pp. 64, 65.

[8] Gross, op. cit. 116-121; see the Eyre of Kent 6, 7 Ed. II. (S.S.) ii 48-50 for a case in which a somewhat similar mercantile procedure was employed in the Eyre.

[9] In the Red Book of Bristol i 69 they are clearly distinguished from jurors; at p. 63 it is stated that no compurgation was allowed in the trial of merchant's contracts, even though there was no tally or writing, because to exact writing or tally would impede trade—"onus et impedimentum continuum esset . . . si singulis vicibus de omnibus particulis mercandisarum suarum . . . tallias seu scripta sibi facere et recipere debent"; cf. Borough Customs (S.S.) ii 188, 189, which shows that other towns accepted this as part of the law merchant.

[10] Red Book of Bristol i 64, "Unde cum defendens in Curiam venerit, et precise neget et demandam seu querelam querentis . . . extunc detur querenti dies ad

the trial had not quite assumed its modern aspect. If the members of the secta stuck to their tale and convinced the court the plaintiff won his case.[1] The defendant could not call rebutting evidence. All he could do was to accuse the plaintiff's witnesses of perjury; and to succeed on this charge he must produce at least two more witnesses than the plaintiff.[2] Thus we see the law at the interesting stage in which the old ideas of proof, though they still prevailed, were fast being developed into something approaching the modern conception of a trial by a court which finds the facts in accordance with the sworn evidence produced before it. It was not till the sixteenth century that the common law trial by a judge and jury definitely reached this stage.[3] It is certainly instructive to see that, even in the trial by compurgation, there were possibilities of a development, which, if it had continued, might have ended in the final evolution of a rational procedure.

If we turn from adjective to substantive law we can see that the commercial character of these tribunals similarly affected the nature of the law which they administered. No doubt a considerable number of the entries on the records of the fair courts are taken up with recording the presentments of the juries charged with bringing to justice those who had offended against the peace and order of the fair. Many of these entries do not differ from the presentments of similar juries in the boroughs and leets of the country at large.[4] But such presentments as those

proximam curiam ad ducendum et probandum, et defendenti ad audiendum probaciones querentis . . . nisi forte sectam suam ad illam primam curiam adduxerat paratam; quod si fecerit statim admittantur et examinentur: quæ examinatio sic fiat"; each witness is sworn separately to speak the truth; "Et tunc examinetur per sensescallum Curiæ in aperta audiencia parcium et totius curiæ et irrotuletur ipsius probacio . . . et ita post modum successive examinentur et jurentur omnes adducti quilibet per se separatim. Et si Senescallus et curia suspicionem habeat quod hujusmodi adducti sint locati vel subornati ad dicendum falsum tunc nullus eorum audiat alternis examen"; cf. Red Book of Bristol i 79, 80.

[1] Ibid 65, "Et si demonstrationem suam probare poterit cum tribus testibus notis et fide dignis et sufficientibus, tunc recuperet secundum quod probaverit, nisi forte defendens offerat et novam securitatem inveniat ad convincendum querentem in forma quæ subsequitur."

[2] Ibid 79, 80, "Queratur a defendente antequam judicium reddatur si aliquid pro se habeat vel dicere sciat quare secundum probaciones illas ad judicium procedi non debeat. In quo casu est ordinatum quod defendens ille in sua propria persona tunc sit ibi et offerat se paratum ad reprobandum et convincendum querentem seu petentem et sectam esse perjuros;" the proper forms as to finding security and the like having been complied with, "Tunc uterque potest adducere, scilicet querens (sc. defendens) ad convincendum, et defendens (sc. querens) ad efforciandum, primam sectam suam productam. Et ille cujus probacio extunc melior et verior comperta sit habeat judicium pro se . . . ita tamen quod convixio sive attincta pro nullo habeatur nisi ipse qui convictus est excedat eum qui convincendus est in numero per duos testes ad minus."

[3] Vol. i 334-336; vol. iii 648-649; vol. iv 516-518; vol. ix 131, 178-185.

[4] Vol. ii 389-391.



which relate to forestalling,[1] selling out of the fair, selling without making a proper display of one's goods,[2] or using false measures,[3] are naturally prominent. No doubt, too, a certain number of entries relate to ordinary torts—theft, assault, trespass and so forth. But here again some of these cases illustrate the commercial character of the fair. There is an action in tort for impeding a sale;[4] and other notable examples are to be found in actions for defamation whereby the plaintiff has suffered in his trade and credit.[5] By far the most important of these entries, however, relate to commercial contracts; and it is assumed that the litigation concerning these contracts will be conducted in accordance with a law merchant made and administered by the merchants native and foreign who come to the fair.[6] The king had promised the foreign merchants in 1303 that their disputes should be speedily settled by such a law;[7] and, considering the large number of various cities represented at the fair of St. Ives,[8] and doubtless at other important fairs, it will be clear that it was only a law, from which national technicalities were as far as possible eliminated that would suffice for their needs. If we could understand the nature of this law administered in the English fair courts we must glance rapidly at some of the cases recorded on their rolls.

As we might expect, cases turning upon the contract of sale are the most numerous. The contract was generally made by the agreement of the parties evidenced by the gift of a God's penny or earnest money.[9] The mode by which it was enforced

[1] Gross, op. cit. i 48, 92, 93; for the common law as to forestalling see vol. iv 375-379.

[2] Gross, op. cit. 21, 56, 78.

[3] Select Pleas in Manorial Courts (S.S.) 149, 153, 154; Gross, op. cit. i 19, 40, 62, 74.

[4] Ibid 17; at p. 97 there is an action of trespass in which the plaintiff asserted that, having bought certain salmon for 24s., the defendant "de dicto barganio ejecit" the plaintiff, and bought them for 28s.

[5] Ibid 13, "Et insuper defamavit ipsum Johannem versus quosdam mercatores, per quam defamacionem idem Johannes perdidit in mercandisis suis faciendis ad valenciam duodecim denariorum ad dampuum et vituperium suum dimidie marce"; 57—a slander "per quam famam perdidit creanciam"; 85—a similar allegation.

[6] Vol. i 536.

[7] Carta Mercatoria, Munimenta Gildhallæ (R.S.) ii Pt. I. 206, 207, "Et si forsan super contractu hujus modi (i.e. contracts between merchants) contentio oriatur, fiat inde probatio vel inquisitio, secundum usus et consuetudines feriarum, et villarum mercatoriariarum ubi dictum contractum fieri contigerit et iniri. . . . Item quod omnes ballivi et ministri feriarum, civitatum, burgorum . . . mercatoribus antedictis . . . celerem justitiam faciant de die in diem, sine dilatione, secundum legem mercatoriam, de universis et singulis quæ per eandem legem poterunt terminari."

[8] Thus in 1312 we read of merchants from Louvain, Diest, St. Troud, Bruges, Ypres, Ghent, St. Omer, Caen, Dinant, as well as merchants of the society of the Bardi and of the society of London, Gross, op. cit. i 91; cf. Select Pleas in Manorial Courts (S.S.) 134.

[9] The validity of these forms had been recognized by the Carta Mercatoria, Munimenta Gildhallæ (R.S.), ii Pt. II. 206; see Gross, op. cit. 39, 40, 79; at p. 103 both a God's penny and earnest money are given.

was the action of debt in which compurgation played a large part. But we have seen that this primitive procedure was rendered more rational by the power of the court to examine witnesses; and that the case was sometimes decided in quite a modern fashion according to the impression made on the court by the evidence thus given.[1] We can see too that certain rules relating to the incidents of this contract, which were afterwards incorporated into the common law, were being evolved. Damages for the defective quality of the goods sold could only be got if seller had warranted their quality;[2] and similarly damages could be got if the goods had been warranted equal to sample and had failed to come up to the sample.[3] As in the later common law, the failure to fulfil such warranties was regarded as a species of fraud.[4] There seems to be no evidence as to whether a purchaser from a seller who was a non-owner could get damages if he were evicted. Judging from the analogy of the law as to defective quality, and from the later common law as to liability for defective title,[5] it is probable that he could not, in the absence of an express warranty. There is more evidence as to the rights of the true owner against the purchaser of his goods; but it is conflicting. It would seem that, though, in the interests of commerce, both borough and fair courts were inclined to protect the purchaser,[6] no certain rule had as yet been involved. At any rate, in 1332, it appears that proof of the plea of purchase in market overt, though it was generally recognized as a defence against a charge of theft, did not necessarily secure the purchaser's title.[7] In England, as on the Continent, the customs on this matter were very various.[8] Eventually, as we have seen, English law decided to admit that the proof of such a plea gave a good

[1] Above 107-108.

[2] Gross, op. cit. 60—sale of cheeses which the vendor "pledged to be good and fit to eat"; cf. the Lancaster custumal of 1562, Borough Customs (S.S.) ii 153, "Also that they which bye any malt on the markett or elsewhere within this towne, lette their eye be their chapman, for yf it prove nought, thei shall have no remedie for it afterwards, except thei can prove the seller thereof dyd warrand the same to be good."

[3] Gross, op. cit. 91, 102, 105-106.

[4] Vol. iii 408; vol. viii 68-70; cf. Gross, op. cit. 50, 91, 102, 106; frauds could also be presented and tried by an inquest, see ibid 62—a charge of selling with false measures, and of mixing Rhenish with white wine to defraud the merchants.

[5] Below 297.

[6] Gross, op. cit. 48, 49—a bona fide purchase in the market was accepted as a good defence to criminal proceedings for theft, and the purchaser was allowed to keep the goods.

[7] Ibid 110, 111—W. found in S.'s stable a horse which he alleged to be his. He caused it to be seized by the steward of the liberty. S. brought the horse to court. S. and G. in court showed that G. put the horse in S.'s stable; and G. claimed to be owner as he bought it "in pleno mercato." The court decided that W. could not proceed against G. by seizing the horse—"ideo dictum est ei quod sequatur in alia forma si sibi viderit expedire."

[8] Above 98-99, 104-105.



title to a bona fide purchaser in market overt. This conclusion had been substantially reached before 1473, and was settled law by 1596.[1] With the limitation upon this privilege which results from a successful criminal prosecution,[2] and with the peculiar rules relating to the sale of horses,[3] I have already dealt.

Another contract which sometimes appears on the rolls is the contract of partnership. Generally they are quite simple cases. Two merchants have agreed to join in the hire of a booth for the fair and one has ejected the other.[4] Goods have been handed over to a fellow merchant to exchange for other goods, and he will not hand over their equivalent.[5] But one case heard in 1300 at St. Ives raises an interesting point of law which has often come before the courts in modern times.[6] In this case the plaintiff sued on an agreement to trade in Scotland, on the terms that he was to have one-third of the profits and his partner two-thirds, and that the losses were to be shared in the same proportion. He admitted the receipt of 60s. from the defendant, which, with money of his own, was to be the partnership capital; and alleged that, when the business had resulted in a profit he had paid over his partner's share of the profits, but now that the business had resulted in a loss his partner would not pay his share of the losses; but had demanded his 60s. as a debt, and had compelled him to hand over certain property as security for it. The defendant succeeded in showing that there never had been any contract of partnership, but merely a loan by him to the plaintiff to enable him to carry on his business.

The commercial character of the litigation in the fair courts is also illustrated by the actions to which the employment of brokers gave rise. There are actions by brokers for their fees,[7] and there are actions on contracts made through them.[8] Counsel were treated like other agents, and sued for their fees and expenses.[9] We have seen too that among merchants both the contractual and delictual liability of masters for the acts of their apprentices and servants was somewhat larger than the liability imposed by the rules of the mediæval commom law.[10] The master as well as the servant or apprentice was liable to pay and

[1] Above 105 n. 4; before 1473 the doctrine had made its appearance in the Y.BB. See Y.BB. 9 Hy. VI. Mich. pl. 28 p. 45 *per* Paston; 33 Hy. VI. Hil. pl. 15; 35 Hy. VI. Mich. pl. 33 pp. 28-29 *per* Haltoft and Prisot *arg.*

[2] Vol. iv 522. [3] Ibid. [4] Gross, op. cit. 49.

[5] Ibid 64. [6] Ibid 77, 78. [7] Ibid 15.

[8] Ibid 39, 40.

[9] Ibid 96, 97; cf. Select. Pleas in Manorial Courts (S.S.) 155, 156 a case which gives a curious sidelight on the professional habits of the day—"not only does a professional advocate sue for his fees, but he makes it a ground of complaint against his employer that he has been debarred of getting money out of the other side: no one seems to be surprised at this."

[10] For these rules see vol. iii 382-387.

able to sue for goods which had come to the master's hands through his servants or apprentices, even though he had not authorized their acquisition;[1] and in some places he might also be liable for certain of their misdeeds though committed without his authority.[2] The special rules of this kind relating to mercantile agency were, as we have seen, recognized by the statute of the staple.[3] Other mercantile contracts which appear on the rolls are contracts of suretyship—there are actions by paying sureties against the principal debtor,[4] and by creditors against sureties;[5] contracts of deposit,[6] of loan,[7] of carriage,[8] and for personal services of various kinds.[9]

As on the rolls of the borough courts, so on the rolls of these fair courts, we sometimes get very curious actions which illustrate the lighter side of the happenings at the fair. In 1288 at St. Ives an action was brought against a quack doctor, by name Roger Barber, who had undertaken to cure the plaintiff, John of Eltislay, of baldness for the sum of 9d. paid in advance. Roger "put his patient in plaster" on Tuesday and Wednesday, and then left him. The court decided that John must be repaid his 9d.[10] In another case of 1316 the plaintiff made a sporting agreement with the defendant to sell all the money he had about him on a particular day for 10s. The plaintiff forthwith tendered all the money he had about him, to wit 7s. 7¼d. and demanded the 10s. which was refused. The court gave judgment for the plaintiff.[11]

Like the continental fairs, the English fairs began to decline in the fifteenth and sixteenth centuries.[12] Here, as abroad, commerce was tending to become fixed in permanent urban centres; and the system of staple towns helped on this tendency.[13] Thus, though some of these centres still continued to hold a special fair court, that court either became gradually merged in the ordinary courts of the town, or more often it decayed,

[1] Red Book of Bristol i 66-67, cited vol. ii 387 n. 10; it must be proved that the relationship of master and servant existed at the time of the acquisition; if this were proved, the subsequent death or dismissal of the servant did not affect the right to sue; cf. Liber Albus (R.S.) 286 for a similar rule in London.

[2] The Waterford rule as to apprentices (1300) was that "Every citizen ought to answer for his apprentices' wrongdoing and damage, made by day or night and at all times, as he would for his son if he were of age," Borough Customs (S.S.) i 222.

[3] 27 Edward III. st. 2 c. 19; vol. iii 387.

[4] Gross, op. cit. 6. [5] Ibid 26, 101-102. [6] Ibid 21-22.

[7] Ibid 44, 107. [8] Ibid 43.

[9] Ibid 13, 59, 60—personal service during the fair; 22—service of delivering parcels; 57-58—employment as baker; 83—sailing a boat and other services.

[10] Ibid 36-37. [11] Ibid 100.

[12] Vol. i 539-540; as Mr. Gross says, op. cit. xvii, "the documentary material regarding the activity of piepowder or fair courts . . . increases in range, though not in richness during the fourteenth and fifteenth centuries."

[13] Gross, op. cit. xvii; for these towns see vol. i 542.



owing to the absorption of its jurisdiction by the central courts.[1] Unlike the fair courts of the Continent,[2] our English fair courts made no permanent contribution to the growth of special commercial courts, and took no large share in the development of a system of commercial law. The reasons for this difference between England and the Continent were (i) economic, and (ii) legal.

(i) We have seen that all through the Middle Ages England was economically in a backward state of development.[3] The production and export of raw material, and the import of foreign manufactured commodities, were the outstanding features of its foreign trade. And this foreign trade was to a very large extent in the hands of foreign merchants. We read in the Venetian Calendar[4] how in 1287 "Thomas Lauredano sent to England by Nicoleto Basadona about 10,000 lbs. of sugar and about 1,000 lbs. of candy, and four livres tournois gross, in money amounting to 3,580 livres. Nicoleto sold the goods in London, and went to St. Botolph's (Boston), where he invested the money in wool, which he shipped on board two coggos for Flanders." These foreign merchants lived very much to themselves. The Venetians and the Hanse, for instance, had their own factories in London. They naturally preferred to settle their own disputes, and attempted fairly successfully to prevent their own countrymen from appealing to any jurisdiction except that of their own consuls.[5] No doubt English merchants had some share in the export trade of the country. But this trade was confined to the staple towns, and cases connected therewith were determined for the most part by the special courts of the staple.[6] The result was that the great bulk of the cases which came before the courts of our English fairs and boroughs were concerned with the smaller transactions of internal trade. Naturally these economic facts reacted upon the law administered in their courts.

(ii) The impression which the published records of our fair

[1] Gross, op. cit. xviii-xx; vol. i 569.

[2] Above 93-100. [3] Vol. iv 315.

[4] Calendar of State Papers (Venetian) (1202-1509), 3-4.

[5] Ibid 71—a decree of the Senate of August 1446, "Forbidding Venetian citizens resident in London and Bruges to have recourse to the local courts of judicature for the settlement of disputes among themselves; any Venetian suing a fellow-countryman in any such court to incur a fine of 500 golden ducats"; cf. ibid 296—regulations of the Venetian Factory in London ratified by the Senate in 1503, which illustrates the jurisdiction exercised by the Venetian consuls. At the same time they sometimes had recourse to the English courts—thus in 1456, owing to the insults of the Londoners, all the Italian merchants withdrew to Winchester, and they wished to get the king to appoint a judge who should sit at Winchester to settle "all lawsuits and causes arising between Englishmen and Italians and amongst Italians that they may not have to go to the law courts of London," ibid 84-85.

[6] Cf. L.Q.R. xvii 67; vol. i 542-543.

courts leaves upon me is that they were courts which dealt for the most part with petty transactions, and that consequently, the law there administered had not much chance to develop. The forms of action, the procedure, and the rules of law possess the same primitive characteristics as marked the business in other local courts. Compurgation meets us at every turn. There is no clear line between tort and contract. The proprietary character of a debt and of the action of debt is sometimes very pronounced.[1] It is true that we sometimes read of "scripta obligatoria" which bound their makers to pay the person named therein or his certain attorney, or the bearer;[2] and we shall see that on the Continent "scripta obligatoria" of this kind were one of the germs from which the negotiable instrument was subsequently developed.[3] But the process of development has not gone far in this country. Thus the powers of the "certain attorney" are limited: he cannot plead "non est factum" to a release under seal alleged to have been made by the payee.[4] It is true that in London we can read much about the regulation of brokers and their evasions of the usury laws.[5] But what Miss Bateson has said of the law administered in the boroughs[6] is generally true of the law administered in the fairs. Neither in our fair nor in our borough records do we read much of the beginnings of those legal doctrines of our modern commercial law which were beginning to spread from Italy and south-western Europe to the great fairs of France and the trading cities of the Netherlands.

The fact that the notary never took the position of importance in England that he took abroad is significant.[7] He was known well enough in England. In fact he was needed for the work of the ecclesiastical courts, and for public acts relating to foreign affairs;[8] and he appears on occasions of more than ordinary

[1] In the twelfth century custumal of Okehampton, Borough Customs (S.S.) i 133, we read "Si quis *debitum* alicujus burgensis *asportaverit*, burgensis catalla asportantis in burgo suo capiant"; this is of course an early custumal, but even at the beginning of the fourteenth century Debt and Detinue were not clearly distinct, cf. Gross, op. cit. 99, 103; cf. above 109 n. 4 for another instance.

[2] Select Pleas in Manorial Courts (S.S.) 152, "Scriptum obligatorium inter ipsos confectum portanti solvisse debuerunt"; Gross, op. cit. 62, a promise to pay "domino Willelmo vel suo certo attornato deferenti scriptum obligatorium"; 65, 66, 67—"per litteram obligatoriam solvere predicto Johanni vel suo certo nuncio litteram obligatoriam deferenti"; 86-87—a promise to pay to the plaintiff "vel suo certo attornato."

[3] Vol. viii 115-124.

[4] Gross, op. cit. 66-67.

[5] Munimenta Gilhallæ (R.S.) i 368-373, 394-402; similarly in the sixteenth century they were often in league with thieves, and assisted to dispose of stolen property, Aydelotte, Elizabethan Rogues and Vagabonds 97-98.

[6] Above 105-106.

[7] P. and M. i 197; for the notarial system abroad see above 78-79.

[8] See instances cited by Brooke, The Office and Practice of a Notary of England (ed. 1901) 11-13.



solemnity.[1] And though the fact that he was an imperial or a papal official occasionally led English kings from patriotic or interested motives to refuse to allow him to exercise his office,[2] he was never permanently excluded. But he was never needed, and therefore was never recognized by the mediæval common law. I cannot but think that if Englishmen had had much need to use the commercial instruments which these notaries drew, if these instruments had come with any frequency before the courts, we should have seen a similar class arising in England. That no such class arose in the Middle Ages points, I think, to the fact that the larger commerce was mainly in foreign hands, and that the litigation arising from it did not trouble the English courts. And the fact that in the fifteenth and sixteenth centuries, when England began to take her own foreign trade into her own hands, a new commercial sphere of work opened to the notary, renders this hypothesis the more probable. Laymen as well as ecclesiastics began to fill the office. They began to be employed in England, as they were employed abroad, to draw up many different kinds of documents; and to this day all notaries are members of the Scriveners Company.[3] But though notaries thus came to be used in England, they never attained the same position in English law as that which they attained abroad.[4] Like much else that is peculiar to English law, the reason must be sought in the characteristics of the common law in the Middle Ages, and in its history during the sixteenth and seventeenth centuries. The backward economic condition of England in the Middle Ages, and the insularity of the common law, were the reasons why that common law never needed, and therefore never recognized, an official of the civil or canon law. The Reformation of the sixteenth century, and the victory of the common law over its rivals in the seventeenth century, reduced the civil and ecclesiastical law to a subordinate position; and the officials recognized by them naturally shared their fate.

The economic position of England in the Middle Ages had

[1] Thus we find notaries among the persons deputed to give Richard II. notice of his deposition and to receive his resignation, R.P. iii 416, cited Brooke, op. cit. 13.

[2] See two writs of 13 Edward II. cited by Prynne in his preface to his Animadversions on Coke's Fourth Institute, according to which imperial notaries were forbidden to exercise their office in England—to allow them, it was said, implied some sort of subjection to the emperor; ibid at pp. 58, 59 he cites the case of John de Bourne who, 3 Edward III., was imprisoned by the Barons of the Exchequer, because, with a view to questioning subsequently the proceedings in an ecclesiastical court, he brought a papal notary into the court of Exchequer to record the proceedings in a plea between himself and a parson.

[3] Brooke, op. cit. 14, 15. Their later history is uneventful. At the Reformation the king assumed the papal power to appoint notaries, and vested it in the Court of the Faculties which was under the control of the Archbishop of Canterbury, 25 Henry VIII. c. 21; that body still appoints, but the office is regulated chiefly by the statutes 41 George III. c. 79, and 6, 7 Victoria c. 90.

[4] Above 78-79.

thus prevented our boroughs and fairs from doing much for the development of our commercial law during this period. For reasons which we must now explain they were unable, in the sixteenth century, to assume jurisdiction over that larger commerce in which Englishmen then began to take an active part.

We have seen that the outstanding feature of English legal history in the Middle Ages was the presence of an expanding common law which was gradually and quietly absorbing the smaller local jurisdictions.[1] Since the courts of fair and borough had never acquired a jurisdiction over foreign trade, and had never therefore had a chance to develop the legal doctrines necessary to govern the more complicated transactions of such a trade, they succumbed, like the other local jurisdictions, to the encroachments of the common law. In the course of the sixteenth century the common law courts had assumed jurisdiction over the larger number of cases connected with the internal trade of the country;[2] and the new principles of contractual[3] and delictual[4] liability which they were developing rendered the law which they administered quite adequate to deal with these cases. Cases connected with foreign transactions were, as we have seen, outside the scope of the common law courts in the earlier part of the mediæval period.[5] If a contract were made abroad no jury could come from the foreign place to find the facts. But these cases rarely came before the courts of boroughs or fairs. When they arose they often involved considerations of mixed law and diplomacy. Naturally therefore they came before the Council or the Chancery. Thus in Edward I.'s reign the Lord Mayor of London said that he could not grant a request to enforce a judgment of the fairs of Champagne, in which the "défense des foires," had been threatened, without a reference to the king and Council;[6] and in the Venetian Calendar questions which arose between English and Venetian merchants were generally referred to the same tribunal.[7] In Edward IV.'s reign the chancellor considered that, because cases concerning merchant strangers were outside

[1] Vol. ii 310.
[2] Vol. i 569.
[3] Vol. iii 428-453.
[4] Ibid chap. ii §§ 6 and 8.
[5] Vol. i 534; vol. ii 309-310; the exhaustive analysis made by Prynne, Animadversions on the Fourth Part of Coke's Institutes 90-95, is really quite conclusive on this point; see especially his references to the Doctor and Student ii c. 2; Perkins, Profitable Book §§ 1, 494; F.N.B. 114 B; but the maze of distinctions drawn in cases which turned on the proper venue of the jury when disputes arose out of facts happening in different counties, Reeves, H.E.L. ii 409-414, afforded an opening of which the later lawyers, and especially Coke, took advantage, below 118-119, 140-142.
[6] Above 98 n. 2; C. Walford, op. cit. 259-260; E.H.R. xxxvii 247.
[7] Calendar of State Papers (Venetian) 126—in 1471 the Council at the suit of William Cowper sentenced the Venetian nation to pay £1200 for damages to a ship captured by the Venetian captain general; ibid 131, Edward IV. reduced the sum to £750; for early instances of such references see E.H.R. xxxvii 247 and n. 5.



the scope of the common law, they were therefore subject to his equitable jurisdiction.[1]

But during the latter half of the fifteenth century the rivalry which had sprung up between the common law courts on the one side, and the Council and Chancery on the other, led the common law courts to wish to encroach upon the sphere of the Council's and the Chancery's jurisdiction; and this attitude on the part of the common law courts led to an expansion of common law doctrine in many directions. Three of these lines of expansion are especially important in relation to the commercial jurisdiction of the common law courts. In the first place the development of the action of assumpsit was giving to the common law an adequate remedy for the enforcement of contracts. In the second place, the development of the action of trover was giving it an adequate remedy for the enforcement of title to goods. In the third place there was a movement towards some modification of the strict rules of venue which, at an earlier period, had barred the common law courts from hearing cases which turned upon acts done or transactions entered into abroad. With the beginnings of the development of the actions of assumpsit and trover I have already dealt.[2] At this point I must say something of the beginnings of those modifications of the rules of venue which were a condition precedent to the attainment of any sort of commercial jurisdiction by the common law courts.

Under the old common law the parties to an action were required to designate with the greatest particularity the place where the events alleged in the pleadings had happened, because the sheriff could not otherwise have summoned a jury who would know the real facts of the case.[3] But this strict rule was found to be inconvenient in cases in which the facts alleged happened partly in one county and partly in another.[4] It was this inconvenience which at the end of the thirteenth or the beginning of the fourteenth century,[5] induced the judges to draw the

[1] Y.B. 13 Ed. IV. Pasch. pl. 5, "C'est suit est pris par un marchant alien, que est venus per safe conduit icy, et il n'est tenus de suer solonques le ley del terre, a tarier le trial de xii homes, et autres solempnities del ley de terre, mes doit suer icy, et sera determine solonque le ley de nature en le Chancery, et il doyt suer la de heur en heure et de jour [en jour] pour le spede de marchants. . . . Et coment que ils sont venus deyns le royalme, pour ce le Roy ad jurisdiction d'eux de mitter d'estoyer a droit, etc., mes ce sera *secundum legem naturæ* que est appell par ascuns ley Marchant, que est ley universal par tout le monde."
[2] Vol. iii 350-351, 428 seqq.
[3] Vol. i 332.
[4] For the mass of decisions, often conflicting, to which this inconvenience gave rise, see Reeves, H.E.L. ii 409-412.
[5] In the Eyre of Kent 6, 7 Ed. II. (S.S.) ii 32, 34 it was ruled that a writ of debt might be brought either in the county where a contract was made or in any county in which the defendant was resident; Staunton J. said that under the old law the writ might have been abated, "but the contrary has been the practice for a long time past."

distinction between transitory and local actions—"that is, between those in which the facts relied on as the foundation of the plaintiff's case have no necessary connection with a particular locality, and those in which there is such a connection."[1] An instance of the former is an action on a contract, of the latter an action of trespass to land. "In the latter class of actions the plaintiff was bound to lay the venue truly; in the former he might lay it in any county he pleased."[2] Litigants were not slow to make use of this distinction; and in 1375[3] an action was brought on a deed which was made at Harfleur in Normandy. The plaintiff anticipated the device used at a later period by alleging in his claim that it was made at Harfleur in the county of Kent. The efficacy of this device was not then decided upon, as the case went off upon another point.

But it was soon found that the parties to actions in this litigious age abused this distinction. Plaintiffs harassed defendants by purposely laying the venue in a distant place; and therefore statutes of Richard II. and Henry IV.'s reigns required all actions to be brought in their proper counties.[4] These statutes were strictly enforced by the judges;[5] and Littleton takes it for granted that cases which involved the consideration of facts happening outside the realm could not be heard by the courts of common law.[6] But the judges were quite alive to the advantages to be got by enlarging their jurisdiction; and it is clear that they were ready to adopt any workable expedient to get jurisdiction over such cases. In 1442[7] an action was brought in the Common Bench on a contract made in France; and counsel, though he pleaded that no action lay on such a contract in England, did not dare to risk a demurrer on this point. Newton, indeed, asserted broadly that even though the contract was made in France, an action would lie in England if the parties chose to sue there.[8] But this was rather too sweeping, as it left unsolved the difficulty as to where the venue should be laid. No doubt there was earlier authority for the proposition that if action was brought on a contract made in a county

[1] British South Africa Co. v. Companhia de Mocambique [1893] A.C. at p. 618.

[2] Ibid; but, as Lord Herschell said, "It was still necessary to lay every local fact with its true venue on peril of a variance if it should be brought in issue," see S.L.C. (10th ed.) i 598-600.

[3] Y.B. 48 Ed. III. Hil. pl. 6.

[4] 6 Richard II. c. 2; 4 Henry IV. c. 18. [5] S.L.C. i 597-598.

[6] Litt. § 440, "Hee that is out of the realme cannot have knowledge of the disseisin made unto him by understanding of the law, no more than that a thing done out of the realme may bee tried within this realme by the oath of 12 men."

[7] Y.B. 20 Hy. VI. Pasch. pl. 21.

[8] "Mesque l'obligation se fist en France, uncore si suit en Angleterre, action peut estre maintenir sur ceo cyeins assez bien;" and Fortescue, Y.B. 32 Hy. VI. Hil. pl. 13, seems to have held the same view.



Palatine, the jury could be summoned from the neighbouring counties.[1] But in the case of an action brought in a foreign country there were no neighbouring counties.

The judges of Henry VI.'s and VII.'s reigns got over this difficulty by laying down a somewhat narrower principle which had been hinted at in the case reported in 1375. They said that if the contract was made in England, or if any part of the contract was to be performed in England, the action could be brought there.[2] The result was that if the contract was made in England to be performed abroad, or vice versa, action lay in the English courts. But if the contract was both made abroad and to be performed abroad, or if the foundation of the action was an act done wholly abroad, no action would lie.[3] It is clear that the establishment of this principle considerably enlarged the jurisdiction of the common law courts. It enabled them to make full use of their new actions of assumpsit and trover, and to compete with the Council and the Chancery for a share in their jurisdiction over the external trade of the country. We shall see that in the following period its further development enabled them to claim not only a share but a monopoly of this jurisdiction.[4]

Thus, by the end of the mediæval period, it had become fairly obvious that the future development of English commercial law would take place in the central courts; and, since in the central courts the merchants played but a small part compared with the part which they played in the tribunals of the cities of Italy, Germany and France,[5] it followed that the manner of its

[1] Fitzherbert's Abridgment, Visne pl. 50, citing 45 Ed. III, Mich.; this seems to have been the rule laid down as to the practice of the court by the protho-notaries in Y.B. 32 Hy. VI. Hil. pl. 13.

[2] Y.B. 48 Ed. III. Hil. pl. 6, Finchden says: "Si un home soit lowe per moy d' aler en mon message a Rome coment que le service sera fait hors de Roialme uncore pur le contrat fait en Engliterre il demandera son lower en cest court"; Tank puts the case of a sailor hired in England: "Il (the hire) sera demande en cest court per le comen ley et memy per la ley de Mariner"; Y.BB. 15 Ed. IV. Mich. pl. 18; 10 Hy. VII. Pasch. pl. 21; S.C. 11 Hy. VII. Hil. pl. 13; in this last case Brian thought that, though a trial of offences committed abroad might be had here—"autrement touts ceux statuts sera voids"—it was otherwise as to contracts made here to be performed beyond the sea; but Fineux, Vavisor and Townshend were against him; the case is abridged by Brooke, *Trialles* pl. 154, and explained by Abbot C.J. in Rex v. Burdett (1820) 4 B. and Ald. 172; Fineux clearly lays it down, in Y.B. 21 Hy. VII. Mich. pl. 32, that, "Release oultre mer est void; mes si contract soit triable parcel deins ce Realm, et parcel oultre la mer, il sera trie icy en tout."

[3] Though in Y.B. 7 Hy. VII. Hil. pl. 1, Keble *arg.* said, "Si en port accion de Debt pur son salary que il fuit retenu a servir un home in Brigg oustre la mer, et le Maistre dit que il depart de luy ou ne servit, ceo serra trie icy ou le bref est port"; the reporter adds Quære de ceo; cf. Y.B. 21 Hy. VII. Mich. pl. 32, cited in the last note; Dowdale's Case (1606) 6 Co. Rep. 47 b, lays down the law in accordance with Fineux's view in the last cited Y.B.

[4] Below 140-142. [5] Above 68-71, 93-96.

development would be in some respects unique. Whether the common law courts, the Council, or Chancery would secure the greater share of this commercial jurisdiction was, as we shall see, an open question all through the sixteenth and the earlier half of the seventeenth century. But, before we consider the results of the work of these courts in the sphere of commercial law, I must say something about the mediæval development of English maritime law. Both in England and in France this development took place in the court of the Admiralty;[1] and in both countries the Admiralty became a serious competitor for a large share of this commercial jurisdiction.

*Maritime Law.*

We have seen that, till the middle of the fourteenth century, the maritime part of the law merchant was, for the most part, administered in the local courts of seaport towns.[2] These courts sat sometimes on the seashore, and heard, as the Bristol custumal says, summarily from tide to tide "the disputes which arose between merchants and sailors, or between merchants and merchants, or between sailors and sailors, whether burgesses or foreigners."[3] Many of them survived, and were vigorously resisting the encroachments of the court of Admiralty in the sixteenth century.[4] But all except the Cinque ports had succumbed before they were formally abolished in 1836.[5] The law which these courts adminstered was almost certainly based upon the Laws of Oleron. It was these laws which, from the first years of the thirteenth century, had been accepted as the common maritime law of the North Sea and the Atlantic Ocean.[6] Important seaports like London and Bristol copied them into their custumals; and, at a later date, they were copied into the Black Book of the Admiralty. Therefore if we would know what was the general character of the maritime law administered in

[1] Vol. i 552; above 101. [2] Vol. i 530-532.
[3] Borough Customs (S.S.) ii 193; cf. The Domesday of Ipswich, Black Book of the Admiralty (R.S.) ii 231.
[4] Vol. i 531-532; Select Pleas of the Admiralty (S.S.) ii *xix-xxii.*
[5] Vol. i 532; 5, 6 William IV. c. 76.
[6] Vol. i 527; cf. Desjardins, Droit Commercial Maritime 31-36; they were, as recent commentators agree, "Des sentences rendues dans de procès réals ou des déclarations sur le droit, fruit d'une longue expérience, et consignées par ces hommes rompûs aux affairs maritimes dans un registre ou sur des rôles pour en perpetuer la mémoire. . . . Il est hors de doute que dans les premières annees du treizième siècle, assez grand nombre des copies des vingt quatre articles avaient été déjà déliverées aux principaux ports de mer et que les *jugements de la mer* se transformaient en coutumes générales pour tout le littoral de l'Atlantique et de la Baltique. Il est donc bien difficile de ne pas les faire remonter à la première partie du douzième siècle, et l'on pourra toujours demander si cette date même ne doit pas être encore reculée," op. cit. 34.



this country in early days we must glance briefly at their contents.[1]

In the first place, they contain a number of provisions as to the position and powers of the master of a ship, and his relations to the sailors. The master has no power to sell the ship; but in case of necessity he may, after consulting with the mariners and by their advice, pledge the tackling of the ship.[2] He is liable for value of the ship if she perishes in consequence of a start made contrary to the wishes of the majority of the ship's company;[3] and he is similarly liable if she is lost in consequence of his wrongful dismissal of a sailor.[4] If he is in a foreign harbour, and has no money to buy necessaries, he may sell part of the cargo. The amount so sold is to be charged to the ship at the market price; but, as it has been carried, the part so sold must pay freight.[5] The mariners are liable if they desert the ship without the leave of the master, and the ship in consequence perishes.[6] They are also liable if they delay too long ashore in a port so that the ship loses money which it might have earned.[7] If the ship is lost their right to wages is also lost.[8] If a member of the crew incurs any hurt while about the business of the ship he is entitled to be healed at the costs of the ship. Similarly the master must look after him if he is taken ill. He is entitled to his wages which must be set off against the costs of his cure, and if he die his representatives can claim them.[9] The master must keep order in the ship, "and if a maryner smyte the mayster (he is) to pay five shillings or to lose his fyst."[10] The meals to which the sailors were entitled were specified in some detail.[11] In addition to food and stipulated wages, it was customary to allow the sailors, either to embark a small amount of cargo for themselves, or to allow them instead the freight payable to the ship on the amount of cargo which they might have embarked.[12] They were not entitled to be paid the whole of their wages already earned when the ship reached her destination. The master might retain some part as security that they would finish the voyage.[13] It was optional to the sailors to hire themselves for the voyage or to stipulate for a sum to be calculated according to the distance travelled. They

[1] The references are to the sections in the Black Book of the Admiralty (R.S.) i 88-131.
[2] § 1. [3] § 2. [4] § 14.
[5] § 23. [6] § 5. [7] §§ 5, 21.
[8] § 3; see vol. viii 253-254 for later developments of the principle that "freight is the mother of wages."
[9] §§ 6, 7—§ 6 enacts that, "yf the mayster sende them in any erande for the prouffyte of the shyppe, and that they shulde hurte theym, or that any dyd greve them, they oughte to be healed at the costes of the shyppe"—a principle not recognized by the common law, but introduced by recent legislation.
[10] § 12. [11] § 17. [12] § 18. [13] § 19.

must always be ready to work the ship home to the port from which they had started.[1]

In the second place, these laws contain a number of rules relative to the rights and duties of the parties to the contract of carriage. The merchant who hires a ship must load her within the stipulated time or pay damages.[2] Of these damages the master is entitled to three-quarters and the mariners to the other quarter.[3] The merchant must pay the freight stipulated when the goods reach their destination. If the ship is wrecked and the cargo is saved he need only pay the freight due for the part of the voyage accomplished; but if the master can either repair his ship, or tranship the goods, and thus convey them to their destination, the whole freight is due.[4] If the cargo is damaged in unloading by defective tackle the master and the mariners are liable for all the damage, unless the merchants have approved the tackle, in which case both parties contribute to the loss.[5] Similarly the master and mariners are liable if the tackle is allowed to damage the cargo on the voyage.[6] The pilot was responsible for bringing the ship to her berth: the master for any loss that occurred through defective mooring at the berth.[7] Whether the cost of pilotage was charged to the merchants or the ship perhaps depended on the agreement of the parties.[8]

In the third place, there are a number of rules as to the incidence of the loss arising from the usual risks of a maritime adventure. In case of collision with a ship at anchor the curious rule was laid down that, unless the moving ship struck the other on purpose,[9] the resulting damage was shared between the two ships and their cargoes. The reason assigned was that, if the colliding ship were obliged to pay the whole damage, it would tempt the master of an old ship to place her in the way of a new ship.[10] Probably the true explanation is that it is an old rule which arose before the law had attained any idea of founding liability on negligence.[11] A ship which damaged another because its anchor was not sufficiently buoyed was liable to make good the damage.[12] Apparently it was only damage done by one ship to another in harbour which these laws contemplated.

[1] § 20. [2] § 22. [3] Ibid. [4] § 4.
[5] § 10. [6] § 11. [7] § 24.
[8] § 13; cf. Black Book (R.S.) i 105 n. 3—the section is very obscure.
[9] § 15—"the mayster of the shyp that hyt the other must swere on a boke, and and his marchauntes with hym, that he dyd it not with his wyll."
[10] "The reason why this jugement was made is, that an olde ship wyllingly lyeth not in the waye of a better, so fer forth as it knoweth not to domage it by grevying, but whan it knoweth wel that it must part by halfe it wyll passe by out of the way," ibid.
[11] Marsden, Collisions at Sea (6th ed.) 119; vol. ii 51-52; vol. iii 375-382; vol. viii 266-269.
[12] § 16.



The only damage happening on the high seas which they contemplate is damage arising from tempest. If a jettison was thought necessary the merchants and crew should be consulted.[1] The master might disregard the refusal of the merchants to consent to a jettison, if he and at least a third part of the crew were prepared to swear that it was necessary.[2] In this case the cargo saved and either the value of the ship or of the freight must contribute to the loss; while the sailors who had done their duty ought to have a tun of wine presented to them from the cargo.[3] A similar rule was applied when it was necessary to cut the mast or cables to save the ship.[4] The cargo paid its share, and the merchants must pay their proportion before the goods were unloaded out of the ship. If they refused to pay, and in consequence of the dispute, the cargo deteriorated, they must bear the loss.[5] If the ship was lost the sailors were entitled to be given something from the saved goods to enable them to return home;[6] but, as we have seen, they were not entitled to wages.[7] The tackle of the ship must be kept safe for the owners;[8] and, as we have seen, the merchants were entitled to have the cargo saved, paying freight.[9]

The laws of Oleron thus provided a set of rules which were no doubt generally sufficient to enable juries of merchants and mariners to settle most of the problems of maritime law which arose in the sea-port towns in the early mediæval period.[10] That they would require to be supplemented as soon as any extension of sea-borne commerce took place is clear. There were many problems for which they made no provision, and there were many points upon which their meaning was by no means clear. Moreover, in course of time it was certain that peculiarities of national maritime custom would begin to make their influence felt.

In the thirteenth century these developments had already begun. There are eleven additional rules in the edition of the laws of Oleron contained in the Black Book of the Admiralty.[11] At least two of these are of native origin. One of them records an ordinance of John's reign that all ships shall strike their sails when required to do so by anyone in command of one of the king's ships.[12] The other records the effect of an ordinance made

[1] § 8. [2] Ibid [3] Ibid. [4] § 9. [5] Ibid.
[6] § 3; as late as the beginning of the nineteenth century it seems to have been uncertain whether or not this rule was a part of English law, Abbott, Merchant Ships and Seamen (3rd ed. 1808), 437.
[7] Above 121. [8] § 3. [9] Above 122.
[10] "Ces dispositions . . . étaient concues dans un esprit très pratique et rédigées dans un langage accessible aux esprits les moins cultivés," Desjardins, Droit Commercial Maritime 35.
[11] Black Book (R.S.) i 121-131, articles 25-35.
[12] Art. 35; Twiss thinks it was made at Hastings, March 30th, 1201, ibid 129 n. 3; introd. xlix seqq.

by Edward I. in answer to a demand made by the Barons of the Cinque Ports, the sailors of Yarmouth, and of other English ports. It provided that, in case of jettison, the ship should lose the freight of the goods jettisoned, but that neither the ship nor its furniture should contribute to the loss.[1] Of the rest, six probably were not purely English developments, as they are found, together with other additions, in that one of the Middleburgh manuscripts which is preserved in the royal library at the Hague.[2] That they were accepted in England is clear from the fact that they are included in the Black Books and in other English MSS. of these laws.

The first of these articles provides that, if a merchant freighted a ship, and the ship was detained by the fault of the master or the lord of the owner, the merchant might throw up his contract.[3] Other articles provide for the right of the merchant who freights a ship to have the whole cargo space in the ship for his goods;[4] for the customary gratuities given by the merchant to the mariners, which are stated specifically to be not legally due;[5] for the care of the cargo;[6] and for the obligation of the merchant to unload within a certain number of days, and for the rights of the master if he does not.[7] The remaining articles may be simply statements of English custom. One provides for the rights of the mariners hired on the terms that they share the freight;[8] and it does not substantially differ from an earlier article on the same matter.[9] Another part of this article, and the earlier articles as to contribution in case of jettison, are changed by the ordinance of Edward I

[1] Art. 32; the article vouches the Roman law—i.e, the Rhodian Law de jactu, Dig. 14. 2; the original ordinance, which is far more detailed and a good deal clearer than the corresponding article in the Laws of Oleron, will be found in the London Liber Albus, Munimenta Gildhallæ (R.S.) i 490-492.

[2] When Twiss edited the Black Book it was thought that these articles were found only in English MSS.—the Black Book itself, the Selden MS. in the Bodleian, and the Cottonian MS. Vespasian B. xxii in the British Museum, and others (see Black Book (R.S.) i *lix*, *lx*); but six of these articles (together with others not in the English MSS.) were found by Prof. Pols in the Middleburgh MS.; he has printed all these articles and shown the manner in which they vary from the English MSS. in Nouv. Rev. Hist. (1885) 459-465, and he gives an account of the MS. ibid 454-459; cf. Desjardins, Droit Commercial Maritime 36.

[3] Art. 25. [4] Arts. 26, 27.

[5] Art. 29, "Yf a marchaunt freyghte a shyp and load it with wynes, it seemeth to the maryners that the marchaunt ought of ryght to give to them in each place where they arrive, and on each day of a double feaste, a pot of wyne or two or three pots; the maryners by ryghte of lawe cannot have or demand anything, but the marchaunt may gyve them in courtoisie what he pleaseth."

[6] Art. 30—if loaded with wine the master should find a boy to look after it, "with as muche care and as often as yf they were the wynes of the mayster"; also he must furnish the merchant with a kitchen if he demand it.

[7] Art. 31—the unloading must be done within twenty-one working days: if it is not, the master may put them on the quay under the charge of a mariner till his freight be paid.

[8] Art. 28. [9] Art. 8.



above mentioned.[1] The two remaining articles provide for the liability of a pilot to compensate the owner and merchants if he negligently fails to bring his ship to port so that she perishes,[2] and for his personal liability to punishment in such a case.[3]

If the court of Admiralty had not arisen in the middle of the fourteenth century,[4] these developments of maritime law, whether initiated by the king's Council, or adopted from the usage of our own or of foreign ports, would probably have been worked out into a body of maritime law by the courts of the more important sea-port towns. But the rise of that court put an end to the prospect that English maritime law would be developed in this way. The Admiralty soon began to attract the greater part of the maritime jurisdiction of the country; and therefore it is in the records of that court and in the cases decided there that we must look for the origins of our maritime law of to-day.

The Admiralty was and still is primarily a department of state. It is for this reason that its earliest records were collected in a Black Book—analogous to the Red and Black Books of the Exchequer,[5] and to the many similar books compiled by the clerical staff of the governing authorities of the larger boroughs.[6] Its contents show us that, before the close of the mediæval period, both the administrative and the judicial sides of the Admiralty were beginning to develop.

The Black Book of the Admiralty has been printed in the Rolls series under the editorship of Travers Twiss.[7] It was probably compiled by an official of the Admiralty at some period in the reign of Henry VI.; but whether it is all written by the same hand is somewhat uncertain.[8] As is usual with these official books, the documents which it contains come from many different periods and sources. It begins with a set of regulations for the Admiral and the fleet upon such matters as the duties wages and other rights of the Admiral, the wages of mariners, the order of sailing, the lights to be carried, prizes, visit and search, and compensation for collisions.[9] Then we have a set of articles to be inquired of by a maritime inquest.[10] The frame of

[1] Above 124 n. 1. [2] Art. 33.

[3] Art. 34—the crew may cut off his head, "withoute the maryners beinge bounde to answer before any judge because the lodeman has committed high treasone against his undertakynge of the pilotage."

[4] For the history and development of the court see vol. i 544-547.

[5] Vol. ii 224-226. [6] Ibid 372, 373-374.

[7] This edition was not printed from the original Black Book, which was then missing, but from a copy, see vol. i *ix-xxvii*; but shortly afterwards the missing book was found at the bottom of a chest supposed to contain private papers belonging to the registrar of the court of Admiralty, ibid iii *vii*.

[8] Black Book (R.S.) iii *viii*. [9] Ibid i 1-39. [10] Ibid i 41-87.

this inquest is exactly similar to the frame of the similar inquests held in the tourn or the eyre and, in later days, in the quarter sessions of the justices of the peace.[1] Like them, it comprised a good deal of law old and new as to the criminal jurisdiction of the Admiralty, the rights of the crown, the Admiralty droits, and the jurisdiction of the court of Admiralty. Other later sets of articles, similar in character, but considerably expanded in size, are contained in later parts of the book. There is the inquisition taken at Queenborough in 1375,[2] and a set of articles translated from French into Latin by Master Rowghton.[3] Following on the first of these inquests there is the copy of the laws of Oleron, with the eleven additional articles of which I have already given some account.[4] The growing fixity in the practice and procedure of the court is illustrated by an unfinished tract on the "ordo judiciorum," [5] the author of which "was evidently a civilian of the school of Bologna." Its introductory article is framed on the model of a similar tract by the great Bartolus, and the author was perhaps his pupil.[6] Its insertion in the Black Book illustrates the fact that the new court of Admiralty from the first looked for its models, not to the common law, but to the civil law procedure. But another regulation as to the procedure inserted in the Black Book,[7] together with the inquisition to which I have alluded,[8] show that in the exercise of its jurisdiction over criminal matters it at first adopted the common law procedure of presentment and inquest; and that in civil matters a trial by jury could be had. Moreover, there is no hint that any other procedure was adopted in the statutes of Richard II. and Henry IV.'s reigns passed to restrict the Admirals' jurisdiction.[9] If the civil law procedure had been adopted at that date Parliament would probably have made it a ground of complaint. But the delays of the civil law are alluded to in a petition of 1394,[10] and the Italian tract contained rules both for civil and criminal procedure.

[1] Vol. i 79, 269; vol. iv 142-144, and App. I. (2). [2] Black Book (R.S.) i 133-177.
[3] Ibid 221-243; "who Magister Rowghton was is not precisely known, but he is supposed to have been Registrar or deputy Registrar of the Admiralty Court sometime in the reign of Henry VI.," ibid 221 n.; see L.Q.R. xxxvii 329.
[4] Black Book (R.S.) i 88-129; above 123-125. [5] Ibid 178-219.
[6] Ibid 278 n. 2; 220 n. 2.
[7] Ibid 245, "Porrecto libello, et eidem responso negative per partem ream, de consuetudine judex potest procedere ad decidendum causam per patriam, dummodo per partes hinc inde posuerint se de concesso in juratam, et tunc judex decernat mandatum emanare, de venire faciendo duodecim probos et legales homines de vicineto parcium predictarum . . . ad dicendum inter partes, quidquid eis constiterit, et super veredictum dictorum duodecim debet judex conferre sententiam etc."
[8] Above 125-126.
[9] 13 Richard II. st. i c. 5; 15 Richard II. c. 3; 2 Henry IV. c. 11; vol. i 548-549.
[10] R.P. iii 322 (17 Rich. II. no. 49); vol. i 548.



It is clear from the statute of 1536[1] that at some period before that date the continental model had been adopted in criminal procedure; and, from the records of the court,[2] that it had been also adopted in its civil procedure.

The remainder of the Book consists of a number of miscellaneous documents which come from the period (1443-1446) when John Holland Duke of Exeter held the post of Admiral.[3] For the most part they are documents connected with judicial procedure. There are also included among them two later documents which are safe conducts, one granted by Louis XI. and the other by Richard Duke of Gloucester while he held the post of Admiral.[4] At the end there are a few miscellaneous documents connected rather with the office and duties of the Constable and Marshal than with the office and the duties of the Admiral.[5] The editor of the Rolls series edition of the Black Book has added an appendix of documents connected with Sir Thomas Beaufort's tenure of the office of Admiral (1412-1426).[6] Many of these documents refer to the judicial work of the Admiralty, and show that the forms of the court were becoming fixed. Then follow a list of the "fees, commodities, and profits appertaining to the Admiral by virtue of his office," [7] the statutes of Richard II. and Henry IV.'s reigns concerning Admiralty jurisdiction,[8] Henry V.'s statute making the breach of a truce or safe conduct high treason,[9] certain French ordinances as to the French Admiralty and fleet, and some ordinances for soldiers in time of war made by Richard II. and Henry V.[10]

There are many sides of the Admiralty's judicial work which have little or no direct bearing upon the growth of English maritime law. Its criminal jurisdiction, and its jurisdiction over Admiralty droits are obvious illustrations.[11] Again, its work in the sphere of international law and politics is, as we have seen, important rather in the history of the origins of international law than in the history of the origins of our commercial and maritime law.[12] It is to its civil jurisdiction that we must look for the development of these two latter branches of the law. But, for the mediæval period, the records of its work in this sphere are scanty. The continuous series of Admiralty records does not

[1] 28 Henry VIII. c. 15; vol. i 550-551; vol. iv 260; it may be noted that a similar change from common law to civil law procedure took place in the court of the Constable and Marshal, Harcourt, His Grace the Steward and Trial of Peers 362-366; for this court see vol. i 573-580.
[2] Select Pleas of the Admiralty (S.S.) i *passim*.
[3] Black Book (R.S.) i 246-275. [4] Ibid 276-279.
[5] Ibid 281-344. [6] Ibid 347-394. [7] Ibid 397-411.
[8] Ibid 412-414. [9] Ibid 414-419; vol. ii 473. [10] Black Book (R.S.) i 421 472.
[11] For these matters see vol. i 550-552, 559-561. [12] Above 47-48.

begin till 1524.[1] But it is clear from the statutes of Richard II. and Henry IV.'s reigns,[2] from the inquiries made at the Admiralty inquests,[3] and from two early cases of 1390[4] and 1389[5] printed by Mr. Marsden, that the Admiralty, in addition to cases directly connected with shipping, was already in possession of a jurisdiction over commercial contracts entered into abroad; and that the expansion of this jurisdiction had already begun to arouse the jealousy of the common lawyers.

The reasons why the court of Admiralty was assuming this jurisdiction are obvious. In the first place, the connection between the cases which arise in connection with merchant shipping and those which arise out of foreign trade must always be close. In the second place, the common law rules as to venue prevented the common law courts from assuming jurisdiction over such cases.[6] In the third place, the civil law procedure of the Admiralty, because it was based on the technical ideas of the civil law, was far more intelligible to the foreign merchant than the procedure of the common law courts. We shall see that in the sixteenth century, when the foreign trade of the country began to expand, these causes operated even more strongly;[7] and that the court of Admiralty became a valuable ally to the Council when these commercial cases came before it.[8]

But even in this mediæval period there were signs that the court of Admiralty would not be permitted to get a monopoly of this kind of business without a struggle. We have seen that the common law courts were beginning to think of making changes in their procedural rules with a view to attracting some of it to themselves.[9] At the same time the Chancellor was also claiming some share, and could offer the advantage of a procedure which, in some respects, was better adapted to the needs of the merchants than that of the Admiralty or the common law.[10] At

[1] Below 137. [2] Vol. i 548-549; above 126.

[3] Rules about matters which belong to the Admiralty, Black Book (R.S.) i 69—Lords of franchises are not, according to an ordinance made by Edward I. at Hastings, to try any question of a ship's obligations unless the sum at issue only amounts to 20s. or 40s.; also "any contract made between merchant and merchant, or merchant or marriner beyond the sea, or within the fflood marke, shal be tryed before the admirall and noe where else, by the ordinance of the said king Edward and his lords"; cf. ibid 163—inquiry to be made as to those who sue at common law when they ought to sue in the Admiralty, and as to judges who usurp Admiralty jurisdiction; ibid 236—a similar inquiry in Master Rowghton's articles; in 1401-1403 a fine was inflicted for this offence by the Admiralty court of the Cinque Ports, Select Pleas of the Admiralty (S.S.) ii *lx*.

[4] Sampson v. Curteys, Select Pleas of the Admiralty (S.S.) i 1-17—an action for trespass to goods, one of the defences to which was seizure by order from the Admiral.

[5] Gernesy v. Henton, ibid 17-26—an action for conversion of money, money due for freight, and money due for salt and herrings bought.

[6] Above 117-119. [7] Below 134, 137-139.

[8] Below 136. [9] Above 118-119.

[10] Above 116-117; below 139-140.



the close of the mediæval period, therefore, it was clear that many courts were preparing to put forward claims to exercise jurisdiction over the new legal business which an expanding foreign trade was bringing to English lawyers. All of these courts helped, as we shall now see, to develop our modern commercial and maritime law.

(2) *The reception of the foreign doctrines of commercial and maritime law.*

The needs of the merchants made this reception absolutely necessary. Naturally their usages and practices were the main sources from which these new rules were derived. But, since on the Continent these usages and practices had been developed in the technical atmosphere of the civil law, some of the doctrines of the civilians of the fourteenth and fifteenth centuries, applicable to commercial and maritime questions, were also introduced. I shall, in the first place, say something of the manner in which these two sets of influences made themselves felt in England; and, in the second place, of the agencies by means of which the new legal rules and doctrines, which these influences inspired, were incorporated into English law.

(i) *Sources.*

We have seen that, on the Continent, the usages and practices of merchants, administered in courts presided over by merchants, were the main foundation of the commercial and maritime law;[1] and that, in England, the mediæval Law Merchant was based upon a similar foundation.[2] We have seen too that England based its maritime law upon the laws of Oleron—just as the other sea-port towns which bordered upon the Mediterranean, the Atlantic ocean, the English Channel, or the North Sea based their law upon similar codes of maritime usage.[3] All through the sixteenth century these continued to be the principal bases of the Law Merchant in England.[4] The records of the court of

[1] Above 93-96. [2] Above 104-112.

[3] "All maritime affairs are regulated chiefly by the imperial laws, the Rhodian laws, the laws of Oleron, or by certain peculiar municipal laws and constitutions appropriated to certain cities, towns and countries bordering on the sea within or without the Mediterranean, calculated for their proper meridian; or by those maritime customs and prescriptions or perpetual rights which are between merchants and mariners, each with other, or each among themselves," Godolphin, A View of the Admiral Jurisdiction 40.

[4] Welwod (ed. 1613) An Abridgement of all Sea Laws Title V—"The debates of seafarers, and seafaring actions, should be decided according to the received laws and statutes of the sea: which failing, then the customs and consuetudes of these are to be followed. . . . And if neither law written nor unwritten custom nor consuetude occurs . . . the last refuge is to the opinions and sentences of skilled and upright men in the profession and exercise of seafaring; because it is old and common that the judgment of skilled and well practised men should be followed in their own trade and calling."

Admiralty sometimes refer specifically to the usages of merchants [1] or of mariners [2] or to the laws of Oleron; [3] and charter parties generally contained a similar specific reference to these laws.[4] Then, too, the merchants were given many opportunities to shape these usages by applying them to the facts of particular cases. In the numerous mercantile and maritime cases which came before the Council there is usually a direction that they were to be settled by arbitration; and among the arbitrators there were usually merchants.[5] The same records show us that the whole law and practice of insurance originated in the first instance from the merchants themselves; [6] and often the governing bodies of the various companies, which had the monopoly of foreign trade to different parts of the world, were given a large power to settle differences arising among their members.[7] In England, as in the Italian cities [8] it was this kind of domestic tribunal which was the most satisfactory to the merchants themselves. The long discussions of the lawyers—whether they were civilians or common lawyers—wasted time, and often hindered the doing of substantial justice.[9]

That the usages and practice of the merchants themselves were the main source of the law is clear from the literature on the subject. If we except the controversial literature upon the sovereignty of the British Seas,[10] and upon the jurisdiction of the court of Admiralty [11] we find that nothing was written during this period by the common lawyers, and very little by civilians. We

[1] Select Pleas of the Admiralty (S.S.) i 98, as to the transfer of a ship or cargo beyond the sea or at sea; ibid i 110—a usage that merchants in Spain appoint their factors by public instrument, and that their authority can only be revoked by a similar instrument; ii 142—as to payment of freight when a cargo of wine is lost by bad weather.

[2] Ibid i 98—last note; ibid 44—a custom of merchants and mariners that shipowners, etc., are not liable for goods not entered in the "boke of ladyng."

[3] Ibid i 82; ii 122. [4] Malynes, op. cit. 98.

[5] See e.g. Dasent ii 377 (1549-1550)—two English and two foreign merchants to arbitrate as to freight payable. xiii 343 (1581)—owing to the delays of the Admiralty a case is sent to arbitration; xiv 24-25 (1586) partnership accounts; xviii 72 (1589)—merchants are to hear summarily a case turning on questions of freight and average; ibid 26—a similar tribunal is to hear a case of account; xxiv 109 (1592-1593)—partnership accounts.

[6] Below 139; vol. viii 274-279.

[7] Vol. iv 320; below 149-150; Dasent xii 207 (1585)—a rebuke to the judge of the courts of common law who interfere with the government of these corporations of merchants by removing cases into their courts.

[8] Above 68-71.

[9] Dasent xxiii 33 (1592)—a distinction is drawn between a judicial hearing by the judge of the Admiralty and a hearing before himself as arbitrator—the latter was clearly regarded as much less lengthy and expensive than the former.

[10] Above 10-11.

[11] Above 12; Coke, Fourth Instit. c. 22; Prynne, Animadversions 75-133; Zouche, The Jurisdiction of the Admiralty of England Asserted; Godolphin, A View of the Admiral Jurisdiction; Ridley, A View of the Civile and Ecclesiasticall Law 172-180.



have seen that W. Welwod, professor of the civil law in the University of St. Andrews, published in 1613 a useful collection of sea laws,[1] large parts of which were incorporated by Malynes in his chapters on maritime law. Marius, a public notary, wrote in 1651, a tract designed to give practical advice on the subject of bills of exchange.[2] It was not until 1676 that a man who had some claims to be called an English lawyer wrote upon these topics. Charles Molloy, who was both a civilian and a member of Lincoln's Inn and Gray's Inn, in the second book of his very successful treatise, *De Jure Maritimo et Navali*,[3] gives us some account of these branches of the law, based partly upon the works of Marius on Bills of Exchange, but principally upon the work of Malynes.

Gerard Malynes, a merchant, was the first Englishman to treat of the Law Merchant as a whole. He was the first to write a treatise on this subject which could be compared with the similar treatises which, throughout the sixteenth century, were appearing in the chief countries of Europe. His book was therefore a pioneer treatise, which introduced English merchants and lawyers and statesmen to the legal doctrines and economic speculations of the Continent; [4] and the fact that it was written by a merchant, and not by a lawyer, tells us something of the manner in which this branch of the law was growing up. It summed up its growth during this period; and therefore it is to Malynes and his book that we must turn if we would understand the nature of this growth.

Malynes [5] was of Lancashire descent—the son of a mint master, who had emigrated to Antwerp in 1552; and it was at Antwerp that he was born. His father probably came to England with his family in 1561. We first hear of Malynes in 1586, when he was appointed one of the commissioners of trade in the Low Countries for settling the value of money. From that time onwards he was frequently consulted by the government on

[1] Above 11.

[2] The fourth edition, enlarged and corrected by the author, is printed in the 1686 edition of Malynes, Lex Mercatoria; the author tells us in his preface that the book is "the crop of four and twenty years experience in my imployment in the Art of a Notary publick, which I am, and do yet practise at the Royal Exchange in *London* both for Inland and Outland Instruments."

[3] The book deals partly with international, partly with commercial and maritime law; the first book is wholly occupied with the former subject, the second with the latter, and the third to some extent with both; it went through many editions, the last being published in 1778—more than a hundred years after its first publication.

[4] The full title of the book is, "*Consuetudo, vel, Lex Mercatoria*: or the Ancient Law-Merchant. In three parts according to the essentials of traffic. Necessary for Statesmen, Judges, Magistrates Temporal and Civil Lawyers, Mintmen, Merchants, Mariners, and all others negotiating in any Parts of the World."

[5] See Mr. Hewins' article in the Dict. Nat. Biog.; and cf. Hewins, English Trade and Finance in the Seventeenth Century xx-xxv.

matters relating to trade and the coinage. He became one of the assay masters of the mint, and was engaged on several schemes to work English mines. He was employed to carry out a project which he had advocated for the coinage of brass farthings; but the project ended disastrously. In 1619 he was imprisoned for debt, because, as he told the king in a petition which he presented to him, his employers had insisted on paying him in his own farthings. In 1622 he gave evidence as to the state of the coinage to the standing committee on trade; and he lived long enough to address a petition to the House of Commons in 1641.

All through his life he had thought and written much on economic subjects; and his writings are the more valuable because he had had practical experience as a merchant. With the facts about which he speculated, and the rules of law about which he wrote, he had come into personal contact. Some of his theories—notably his favourite theory as to the effect of the operations of the exchangers of money upon trade—were false.[1] But, because of the close touch which he maintained with the realities of commercial life, all his works are valuable to the historian of the commerce and the commerial law of this period.

It was perhaps this combination of a speculative mind and a studious temperament, with the practical career of a business man interested in the politics which bore upon business, which induced him to write his famous book upon commerce and commercial law.[2] From the first it was a success. It was first published in 1622, and a second edition was called for in 1629. It was republished in 1636, and again in 1686. In the latter edition it was bound up with other tracts dealing both with mercantile and other subjects.[3]

The book is divided into three parts. The first part contains forty-seven chapters, and deals mainly with the principal topics

[1] Hewins, English Trade and Finance in the Seventeenth Century xxii, xxix; the fallacy was pointed out by Misselden, ibid.

[2] Mr. Hewins, op. cit. says, "We find him turning over the Tower records for information about trade, and reading with interest a scarce manuscript at Lambeth"; and again, at p. xxii, "Malynes' practical experience as a merchant was great, and brought him into contact with men of all kinds. His books abound with little touches which show that he was familiar with and had been engaged in business transactions at most of the great centres of European commerce. We find him buying from Sir Francis Drake pearls which he had brought back after his successful raid on Cartagena in 1587, discussing mining with Sir Walter Raleigh, and experimenting on the properties of diamonds."

[3] It is to this edition that my references are made. It contains also the following tracts:—The Collection of Sea Laws by Welwod; Advice concerning Bills of Exchange by Marius; the Merchants' Mirror by R. Dafforme, late Accountant; An Introduction to Merchants' Accounts by Collins; the Accountants' Closet by A. Liset; the Jurisdiction of the Admiralty of England Asserted by Zouche; the Ancient Sea Laws of Oleron, Wisby, and the Hanse towns translated by Miege; the Sovereignty of the British Seas by Buroughs.



of commercial and maritime law; the second part deals with money; the third part with bills of exchange, process to compel appearance and the execution of judgments, and the various courts in which the Law Merchant was administered at home and abroad. The book is often discursive. We have a fantastical disquisition on the mysteries of numbers,[1] and a useful discourse on weights and measures used in different parts of the world.[2] There is an attempt to give a geometrical description of the world,[3] and an account of some of the new plantations and discoveries.[4] While discussing usury, he turns aside to advocate a favourite scheme for the establishment of a Mons Pietatis under government supervision.[5] His last chapter but one entitled "The Due Commendation of Natural Mother Wit," is a curious mixture of vain speculation and a few anecdotes.[6]

But these aberrations form but a small part of the book. The greater part contains much that is valuable to the economist and the lawyer. Mr. Hewins tells us that he was "the first English writer in whose works we find that conception of Natural Law which was later on to play such an important part in the development of economic science."[7] No doubt his legal lore had helped him to this conception. It is not, however, so much on the speculative problems of economic science, as on the practical side of business life, that the book is strongest. It contains many plain and straightforward disquisitions upon all matters which a merchant should know. There is information upon geography political and physical, statistics, customs duties, accounting, as well as upon the commercial law and practice of the time. He can cite ancient literature and the modern ordinances of continental states. He is familiar with the civil law and the works of the commentators; and the whole book is enlivened by the manner in which he uses his experience of commercial and of public life to illustrate the topics which he is discussing. It is the book of a man who has lived in the contemporary world of commerce, and has taken some part in making the commercial laws about which he is discoursing. He delights in concrete facts—the mechanism of banking, the machinery of the custom house, the encouragement of manufacturers, the standards of money, the working of mines, and the business of the mint. It is for this reason that he was so eminently fitted to explain to Englishmen the principles which underlay the laws which regulated the commerce of his age. He could explain them by reference to fact and experience without using the technical terms

[1] Pt. I. c. 3. [2] Ibid c. 4. [3] Ibid c. 6.
[4] Ibid c. 46. [5] Pt. II. c. 13. [6] Pt. III. c. 19.
[7] English Trade and Finance in the Seventeenth Century xxi.

of the civil law. He therefore conveyed them to England in a form in which they could be readily acclimatized and received either by the common lawyers or the civilians.[1]

Malynes thus crystallized and put into permanent form the mercantile usages and practice which, throughout the century, had been transforming mercantile law. But he recognized that to understand these usages and this practice, some account of the doctrines of the civilians was essential.[2] He notes their opinions on the law as to agency,[3] as to insurance,[4] as to partnership,[5] and as to contracts made verbally.[6] What he has to say as to *pecunia trajecticia* and *usura maritima* could be found in any of the continental treatises of the period.[7] He cites Bartolus as to the extent of territorial waters,[8] and Straccha and other civilians as to points in the law of bankruptcy.[9] In dealing with procedure before the courts of merchants he cites another tract of Straccha—Quo modo procedendum sit in causis mercatorum—"Wherein are many universal things propounded."[10]

That the Law Merchant was chiefly based upon the works of the civilians, who had adapted the civil law to modern commercial needs, is obvious from the works of other authors, and from the practice of the Council. Welwod, in his Abridgment of the sea laws, cites the Consolato del Mare, the Rhodian Law, Straccha, Ferretus, Shardius, Peckius,[11] Bartolus, Baldus, and many other commentators on relevant passages of the Digest; and the Council often associated civilians with the merchants in the very numerous cases which they sent to arbitration.[12] As Sir Thomas Ridley pointed out, this law was far better suited to the needs of the merchants than the English common law, partly because it contained, while the common law did not contain, the rules of law which were made to deal with their cases, partly because these rules were better known to the foreign merchants suing in this country.[13] But, though Malynes would have admitted that the

[1] Pepys rightly regarded the book as a suitable present to a boy who was just going to the East Indies, Diary (Ed. Wheatley) vii 240.

[2] Lex Merc. p. 5, "To give satisfaction to the learned and judicious, I have extracted the observations of the learned in the civil laws, upon all the precedent points, and added them unto the following chapters distinctly from the customs of merchants; using the ordinary name of Civilians in general, without naming any particular author, to avoid ambiguity and uncertainty in the contents of this book."

[3] Op. cit. 79-81. [4] Ibid 115-119. [5] Ibid 120, 150.
[6] Ibid 93. [7] Ibid 122, 123. [8] Ibid 133.
[9] Ibid 158, 160, 161. [10] Ibid 308. [11] Pp. 4-6 (ed. 1613).

[12] See e.g. Dasent iv 92 (1532); ix 168 (1575); xiv 214 (1586); xx 202 (1590-1591); xxiv 70 (1592)—doctors of civil law were to represent the parties before the court of Requests.

[13] Ridley, a view of the Civil and Ecclesiastical Law 175-177, "What equity can it be to take away the triall of such business as belongeth to one court, and to pull it to another court; specially, when as the court from whence it is drawn, is more fit for it, both in respect of the fulness of knowledge that that court hath to deal in such



civil law was the basis of much of the Law Merchant which he was expounding, he would certainly have given it a position of secondary importance as a source of that law. He agreed with his continental brethren[1] in deprecating the excessive technicality of the civilians, and the unpractical character of some of their discussions.[2] Though the knowledge of the civil law was useful, and indeed on some points essential, the main thing was a knowledge of mercantile usages and practice. This he held, was the real foundation of the everyday law which all merchants should know.

(ii) *Agencies.*

What then were the agencies by which this law merchant, based on the usages and practice of the merchants, and moulded by the civilians into a legal system, was incorporated into English law? The answer is that the legislature, the executive, and the courts of Star Chamber, of Admiralty, of Equity, and of common law all took a hand in the work. Therefore of the share which these different bodies took I must say a few words.

The share taken by the legislature in introducing into English law the changes and additions rendered necessary by the changed economic position of the country was not very large. A statute of 1540 made some additions to the jurisdiction of the court of Admiralty, and some new regulations as to rates of freight and as to the duties of shipowners.[3] A statute of 1601 established a tribunal to hear cases of insurance;[4] and other statutes introduced the beginnings of the usury laws,[5] and the laws as to bankruptcy

business, and also of the competency of skill, that is in the judges and professors of those courts. . . . For albeit they (the common lawyers) are very wise and sufficient men in the understanding of their own profession, yet have they small skill or knowledge in matters pertaining to the civil profession: for that there is nothing written in their books of these matters. . . . Whereas contrarily the civil law hath sundry titles . . . concerning these kinds of causes, whereupon the interpreters of the law have largely commented, and others have made several tractates thereon. . . . Besides this business concerns . . . also strangers . . . who do live in countries ordered by the civil law. . . . And therefore it were no indifferency to call them from a trial of that law, which they in some part know, and is the law of their country (as it is almost to all Christendom besides) to the trial of a law which they know in no part;" cf. Zouche, op. cit. 129, 130; vol. i 554-555.

[1] Above 81-84; 93-96.

[2] Op. cit. 3-4—"Bartolus, Baldus, Justinian, Ulpian, Paul . . . Papinian, Benvenuto Straccha, Petrus Santern, Joannes Inder, Baldwinus de Ubald, Rodericus Suarez, Jason, Angel, Andrias Tiraquell, Alciatus, Budeus, Alexander Perusius, Pomponius, Incolaus Boertius, Azo, Celsus, Rufinus, Mansilius, Sillimanus, Accursius, Franciscus Aretinus, Grisogonus, Lotharius, Julianus, and divers other doctors and learned of the civil law have made many long discourses . . . of the questionable matters fallen out among merchants . . . by the reading whereof merchants are like to metamorphise their profession and become lawyers, than truly to attain to the particular knowledge of the said customs or law merchant: for they have armed questions and disputations full of quillets and distinctions over curious and precise, and many of them to small purpose, full of *Apices Juris*, which themselves have noted to be subtelties."

[3] 32 Henry VIII. c. 14; vol. i 549.

[4] 43 Elizabeth c. 12; vol. i 571; below 150. [5] Vol. viii 108-112.

and insolvency.[1] These statutes do not cover much ground. It is therefore to the work of the Council and the courts that we must turn if we would see the manner in which mercantile usage and practice was worked into the fabric of English law.

The work of the Council was indirect, but it was none the less effective. We have seen that it exercised a general superintendence over all other courts.[2] It used this power to give directions to the other courts as to the hearing of commercial[3] and maritime[4] cases which had been brought before it; to compel parties to submit to arbitration;[5] and to carry out the awards of the arbitrators;[6] to prevent creditors and others from making an inequitable use of their legal rights;[7] to collect information from the merchants as to mercantile usages with a view to new legislation or new regulations.[8] Moreover, it helped directly to foster the commercial jurisdiction of English courts by forbidding English subjects to submit their cases to foreign tribunals.[9] In these various ways the Council brought to the notice of lawyers of all kinds the new problems raised by the changed conditions of trade. The civilians, who were called upon to act as arbitrators, were encouraged to study the foreign books upon commercial and maritime law. The common lawyers, who were sometimes asked to assist the civilians, learned something both from the civilians and from the merchants who appeared before them.[10] The chief justices, the attorney and solicitor-

[1] Vol. viii 234-235, 236-240. [2] Vol. iv 83-88.

[3] Dasent xii 341 (1580-1581)—expedition of the procedure of a commission of bankruptcy at Chester; xxviii 362-363 (1597-1598)—a case turning on the misdeeds of a factor at Bombay.

[4] Ibid vii 243 (1565)—a case which had been complicated by different decrees made by the court of Admiralty; xiii 222 (1581)—title to a ship; xiv 257 (1586)—a suit for the recovery of captured goods; xviii 72 (1589)—a direction to the court of Admiralty to expedite the hearing of a dispute as to freight and average, or to appoint merchants to decide it summarily; diplomatic reasons were sometimes the cause for the issue of these directions, see Acts of the Privy Council (1613-1618) 12, 41-42.

[5] Ibid xiv 348 (1586-1587)—compulsion on creditors to agree to an arbitration; xix 396 (1590)—a similar case; and see ibid viii 128 (1573), 199 (1573-1574), 310 (1574); ix 224-225 (1576); x 15 (1577), 315 (1578); xi 27-28 (1578-1579), 415 (1579-1580); xii 116 (1580); conversely the Council interfered if the debtor made a fraudulent use of its interference, xv 97 (1587)—a debtor had abused the privileges given to him and had not paid what was due under the composition.

[6] Ibid viii 195-196 (1573); xii 69 (1585)—both cases of difficulties in enforcing the awards of the insurance commissioners.

[7] Ibid xvi 265 (1587)—process at common law stayed in a complicated commercial case; xviii 362 (1589)—action against a merchant under an obsolete statute stayed; above n. 5.

[8] Ibid viii 397 (1575); ix 43, 163, 177 (1575-1576)—regulations to be made by the Lord Mayor of London as to insurance cases.

[9] Ibid xxvii 20, 131-132, 232 (1597)—English subjects are forbidden to sue in France on a contract made in England; ibid 29—an English subject is forbidden to sue the Levant merchants in the Venetian courts.

[10] Ibid ix 14 (1577)—the attorney and solicitor-general to advise with the judge of the court of Admiralty as to what is piracy; ibid 168 (1575-1576)—some of the common law judges and civilians appointed to arbitrate in a commercial case; in the King v. Marsh (1616) 3 Bulstr. 27, 28, Coke C.J. mentioned a case in which he and other judges had consulted with the civilians as to piracy and the privileges of ambassadors.



general, and any other judges who were members of the Council, assisted to deal with the cases which came before the Council, and to draw up the regulations which were made by the Council from time to time.[1]

At the beginning of this period the Star Chamber (which was then not so distinctly separated from the Council as it afterwards became)[2] heard many cases connected with commercial and maritime law to which foreigners were parties.[3] But it would appear from Hudson's book that, towards the end of the century, these cases were not so frequently heard there.[4] The Star Chamber occupied itself rather with criminal or quasi-criminal cases, disputes between corporations, the enforcement of commercial legislation, or with cases connected with the possession of land or the interests of copyholders—all of which had a more or less direct bearing upon the maintenance of the peace of the country. The one method in which it assisted the growth of commercial law was the effective remedies which it employed to punish forgery, fraud, and abuse of legal process.[5] There can be no doubt that its efforts in this direction tended to inculcate an improved standard of commercial morality. And, in particular, it helped on the growth of an adequate law of bankruptcy.[6]

It is evident from the records of the court of Admiralty that its influence upon the development of commercial and maritime law was of greater importance and far more direct than the work of the Council and Star Chamber.

The regular series of these records begins in 1524.[7] From that date we get the files of Libels and the Act Books;[8] and other classes of records make their appearance during the course of this and the following centuries.[9] Like the records of the

[1] See e.g. Dasent xxxi 252-253 (1601)—the chief justice of the King's Bench and the judge of the Admiralty are to collect information as to the mode in which merchants dealt with insurance cases.

[2] Vol. i 495-497.

[3] The case reported in Y.B. 13 Ed. IV. Pasch. pl. 5, above 117 n. 1, was heard in the Star Chamber; cf. vol. i 504-505; Hudson, A Treatise on the Court of Star Chamber 55, says, "Controversies betwixt merchant strangers and Englishmen, or strangers on both parts *were* there determined; the restitution of ships and goods unlawfully taken, or deceits of merchants"; the precedents cited are from Henry VII. and VIII.'s reigns.

[4] Hudson, op. cit. 54 says, "That happeneth by reason of the haughty ambition of the merchants, who desire to make themselves in their companies like a council of state."

[5] Ibid 65-71, 93, 95-99. [6] Below 150; vol. viii 233-234, 236, 244.

[7] Select Pleas of the Admiralty (S.S.) i lx. [8] Ibid lxi, lxii.

[9] Ibid lxiii-lxv; for an account of the records of the court of Delegates (which heard appeals from the Admiralty vol. i 547) see Marsden, Admiralty Cases 231.

courts of common law,[1] they were all kept in Latin till 1731, except under the Commonwealth.[2] We get no reports of Admiralty cases till 1764[3]—perhaps the regular reporting of cases did not come very naturally to a court which, because it administered the civil law, did not fully recognize the authority of decided cases. These records therefore are the only first-hand evidence which we have as to the doings of the court. The selection of records from the sixteenth century, edited by Mr. Marsden for the Selden Society, shows us that the court was taking over the jurisdiction formerly exercised by the Star Chamber in cases in which a foreign merchant was a party. Even in the mediæval period it had become clear that, in the conduct of these cases, the court of Admiralty had many advantages over other courts;[4] and these advantages became more apparent as trade expanded, and as it became more and more cosmopolitan. Its maritime jurisdiction brought it into direct contact with questions relating to foreign trade; and the fact that it administered the civil law, made the lawyers who practised before it familiar with the books of foreign civilians in which could be found the law applicable to these questions.[5] Its procedure, though it was the lengthy procedure of the civil law, and not the summary procedure used by the Star Chamber the Chancery and the court of Requests,[6] or by the commercial courts of the Continent,[7] was at least as well, if not better,

[1] Vol. ii 479.

[2] Marsden, op. cit. at p. 243 cites a record of August 1, 1660, in which the restoration of Latin is given a place of importance at least equal to that of the restoration of the king, "Non solum linguæ Latinæ feliciter restitutæ sed et illustrissimi principis Caroli Secundi a populo suo diu per Proditores depulsi, nunc miranda Dei providentiæ restaurati."

[3] The earliest in print seem to be the reports of Sir W. Burrell, Marsden, Admiralty Cases; there are a series of Prize Cases printed in the same volume which run from 1758-1765.

[4] Above 128.

[5] Above 134 n. 13; in 1584 Walsingham wrote to the chief justice of the King's Bench to warn him not to issue prohibitions against the Admiralty in cases which fell within its jurisdiction, as the common law, "of these marine and foraine causes is thought not soe properly and aptly to take knowledge," Marsden, Admiralty Cases 231, 232; this is also clearly brought out by Jenkins in 1660 in his argument before the House of Lords: "All merchants abroad make their contracts according to the marine or civil law, the differences therefore upon those contracts, should not be judged by a law that hath nothing in it, either provisional or decisive in such cases. And pardon me, my Lords, if I say the judges of the common law cannot so easily and naturally take notice of the marine law. There are so many terms and clauses (which are *vocabula artis* and *clausula juris*) in every contract, that it is very hard to make an English jury to understand them; not to speak of the differences there are among the civil writers themselves about the true meaning of them," Wynne, Life of Jenkins i *lxxxii*; for some illustrations of the inadequacy of the common law procedure see vol. i 555.

[6] Maitland, English Law and the Renaissance 85; for a good short account see Langdell, Development of Equity Pleading, Essays, A.A.L.H. ii 753-773; below 178-184, 284-287.

[7] Above 93-96.



adapted to the trial of commercial causes than the equally lengthy procedure of the common law. Thus we are not surprised to find that negotiable instruments,[1] policies of insurance,[2] charter parties,[3] and bills of lading[4] were familiar objects in the court of Admiralty some time before they were heard of in the courts of common law. We may remember that it was only civilians, or merchants who had studied the civil law, who wrote upon these topics during the whole of these two centuries and for many years later.[5]

The courts of equity—the Chancery and the court of Requests—did something but not very much for the commercial law of this period. The latter court exercised an Admiralty jurisdiction, delegated to it from the Privy Council in matters of salvage, spoil, piracy, letters of reprisal, and prize,[6] and also, it would appear, in matters which involved the taking of accounts.[7] It was the more easy to delegate such cases to this court since Sir Julius Cæsar and other Admiralty judges were also masters of Requests.[8] It would appear too from Malynes that the Chancery also entertained cases involving the taking of accounts because of the inconvenience of the common law action of account.[9] These cases were generally decided by the chancellor after a reference to, and upon the report of mercantile referees.[10] It also interfered in partnership cases,[11] and in bankruptcy proceedings;[12] and it acted in respect of the commercial cases which came before the common law courts in the same way as it acted in respect of other cases which came before those courts. If the conduct of the parties was inequitable it issued injunctions "until the equity of the cause was examined."[13] But this sphere of activity did not

[1] Below 144; vol. viii 152

[2] Below 144; vol. viii 283.

[3] Below 144; vol. viii 254-255.

[4] Below 143; vol. viii 255-257.

[5] Above 131.

[6] Select Pleas of the Admiralty (S.S.) i *lxv*.

[7] Hicks v. Palington (1590) Moore (K.B.) 297—a question of general average; Dasent viii 67 (1571-1572); xxiv 70 (1592-1593); xviii 363 (1589-1590)—a case transferred from the court of Requests to arbitration; xxvii 122 (1597)—a case heard by the court of Admiralty was transferred to the court of Requests, and the Council ordered it to be retransferred.

[8] Select Pleas of the Admiralty (S.S.) i *lxv*.

[9] Lex Merc. 318; Tothill, *Accompt* at p. 2—two cases of merchant's accounts; Monro, Acta Cancellaria 427, 439, 738.

[10] Monro, op. cit. 484-485, 520, 733; Lex Merc. 319; in a case where the plaintiff had begun a suit in the court of Admiralty, and filed a bill on the same matter in the court of Chancery, the suit in Chancery was stayed, Select Pleas of the Admiralty (S.S.) ii 25.

[11] Tothill, 155; but Egerton showed a disposition to get rid of these cases; in 1614 he made an order that, "Marchants accompts and such like are not to be examined in the Chauncery, for none is to accompt upon oath but to the King onely," Sanders, Orders i 86.

[12] Below 150; vol. viii 238, 241, 244.

[13] Malynes, Lex Merc. 319, "the Chancery, upon Bill and Answer between the complainant and the defendant, granteth an injunction to stay the proceeding in the

become marked till the latter part of the sixteenth century, because, as we shall now see, it was not till then that the common law began to assume jurisdiction over these cases.

The rigidity of the rules of the mediæval common law caused it to start late in the contest for a share in this jurisdiction. But it was successful in securing a share during this period; and it ultimately succeeded in annexing the greatest part of it.[1] I must therefore say something both of the way in which it fitted itself to exercise this jurisdiction, and of the share which it secured during this period.

We have seen that it was not till the latter part of the fifteenth century that the common law courts began to think of relaxing their strict rules as to venue, which prevented them from entertaining cases which turned upon transactions entered into or acts done abroad.[2] We have seen that these rules had been relaxed in such a way that if a contract was made or to be performed in England action could be brought on it in the common law courts; but that no action would lie on a contract made abroad and to be performed abroad, or on any other act done wholly outside England.[3] It was during the sixteenth century that this last limitation imposed by the rules of venue was got over by the adoption of the fiction employed by the pleader in the Year Book of 48 Edward III.[4] The plaintiff alleged an act taking place outside the realm, and then asserted that that foreign place was situate at a place in England—"to wit in the parish of St. Mary le Bow in the Ward of Cheap." The advantages of this device were obvious. It gave the common law courts jurisdiction in transitory actions over all acts and transactions, even though they happened wholly outside the kingdom; and it was clearly these advantages which led to its adoption.[5]

Neither the technical reasoning by which this device was justified, nor the date at which it prevailed are quite clear.

(*a*) It would appear from the cases that the line of reasoning pursued depended upon an extension of the notion of "local and

courts of common law, until the equity of the cause be examined; and if there be no matter of equity found, then the cause is dismissed to the law again, with costs to the party"; it also used this means to force creditors to consent to a composition, see Ramsey v. Brabson (1583-1584) Choyce Cases 174.

[1] Vol. i 556-558; below 153-154.

[2] Above 118-119.

[3] Above 119.

[4] Y.B. 48 Ed. III. Hil. pl. 6; above 118.

[5] Note that in Dowdale's Case (1606) 6 Co. Rep. 47b, it is said that, "Where as well the contract as the performance of it is wholly made or to be done beyond sea, *and it so appears*, then it is not triable by our law." But by the aid of this fiction it never "so appeared;" cf. Robert v. Harnage (1704) 2 Ld. Raym. 1043, where by the inadvertence of the pleader in omitting to insert the words "to wit, at London, etc.," it did so appear, and the writ abated.



transitory"[1] from the nature of the action to the nature of the defence. Littleton had said that if, in an action of trespass for battery or for goods carried away, the defendant pleaded not guilty in manner and form supposed, the plaintiff would recover, though the trespass was committed in another town than that alleged in the action.[2] In Elizabeth's reign this was so, even if the trespass was committed in another county.[3] Thus, though by statute the venue must be laid in the proper county,[4] the defendant could not traverse the venue laid by the plaintiff, unless his plea was local in its nature, i.e. depended for its efficacy on the place in which the facts alleged in it happened. If his plea was transitory in its nature he could not object to the venue laid by the plaintiff. If, for instance, to an action for assault and battery in the county of X, it was pleaded that the defendant *molliter manus imposui* to prevent the plaintiff from entering his (the defendant's) house in the county of Y, the plea was local, as the cause of justification was local; but if the plea was *son assault demesne* it was transitory.[5] It is clear that most defences to actions on contracts, or to actions for torts to the person or to goods, are transitory. Therefore in most cases the defendant could not traverse the venue laid by the plaintiff. In other words the venue so laid was untraversable, and the objection based upon venue to hearing transitory actions founded upon foreign facts disappeared.

(*b*) The date at which this device was adopted by the courts of common law cannot be fixed with precision; but it was certainly during the latter half of the sixteenth century. In Henry VIII.'s reign it was commonly used in the courts of the City of London. Brooke, who had filled the offices of common sergeant and recorder of London, after abridging the pleading in the Year Book of 48 Edward III., says that this was the common practice in London in that reign, and that in such cases the place alleged was not traversable.[6] But probably it did not become a common practice in the courts of common law till a little later. Perkins, whose "Profitable Booke" was first published in 1530, states the

[1] Above 118.

[2] Litt. § 485.

[3] Co. Litt. p. 282a.

[4] Above 118.

[5] Peacock v. Peacock (1599) Cro. Eliz. 705; cf. Inglebatt v. Jones (1588) Cro. Eliz. 99; Purset v. Hutchings (1601) Cro. Eliz. 842; and cf. Williams, Notes to Saunders' Reports 248, n. 1, "It is a rule that if to a transitory action the defendant pleads any matter which is itself transitory, he is obliged to lay it at the place mentioned in the declaration. But if the justification be local, the defendant must plead it in the county where the matter rose; and at common law the cause must have been tried there, and not in the county in which the action was laid; otherwise it was error."

[6] Brooke, Abridgment, *Faites* pl. 95, "Home covenant de servir ove D. S. in le guerre in France per indentur que port date a Rone in France, et il counta pur son wages que le fait fuit fait al Rone in Kent, et bien, et sic utebatur in London tempore H. 8 sur autiels faits, quar le lieu nest traversable;" ibid *Obligation* pl. 87.

old law;[1] and in 1539 a bill, which was apparently intended to give the common law courts jurisdiction over contracts made abroad, was rejected by the House of Lords.[2] But in the latter half of the century the power which the legislature refused to give was secured by the adoption of this fiction. In *Dowdale's Case* (1606) its legality was finally upheld;[3] and cases of 1586 and 1589[4] in which it had been adopted were approved. The old reasoning, which based jurisdiction on some act done in England,[5] was thereby rendered unnecessary, because a plaintiff in any transitory action was now able to transport to Cheapside any act done in any part of the world.

In spite of the arguments of the civilians, who gravely proved that such a fiction was wholly contrary to the principles of the civil law regulating the employment of fictions,[6] in spite of the reluctance of the Council to accept it,[7] and in spite of the ridicule of Prynne,[8] the common lawyers held their ground. The result was that the common law courts, instead of being the least open of all courts to foreign actions, became the most open, provided that the cause of action was transitory.[9] The chief limitations upon their jurisdiction arise either from their refusal to enforce rights wholly contrary to the principles of English law,[10] or from the physical impossibility of serving process upon a foreign defendant who is out of the jurisdiction.[11]

[1] Perkins, Profitable Booke §§ 494, 737.

[2] Lords' Journals i 112, "Billa per quam debita in transmarinis partibus per singraphas concessa habilia efficiuntur in hoc regno Angliæ implacitari; quæ quidem Billa jam prima vice est lecta et relicta."

[3] 6 Co. Rep. 46b. [4] Ibid 47b, 48a.

[5] Cf. Ilderton v. Ilderton (1793) 2 Hy. Bk. 162, where it is pointed out that there is no need to resort to this fiction if some part of the transaction happened in England.

[6] Ridley, View of the Civil and Ecclesiastical Law 173-178; Zouche, Jurisdiction of the Admiralty Asserted, Assertion viii; Godolphin, A View of the Admiral Jurisdiction, c. 7.

[7] Dasent xxiv 110 (1592-1593)—from a letter of the Council directing arbitration in a partnership case it appeared that one partner had refused arbitration, "Whereunto, as we are informed, he is induced the rather for that the contracte of partnershipp passed betwene them grewe and was made beyond the seas, which can receave no triall here at common law"; the frequent remonstrances of the Council to the judges on account of their issue of writs of prohibition and other interferences with the Admiralty point to the same conclusion, Dasent xiv (1586-1587) 317; Dasent xv (1587) 314; Dasent xxix (1598) 367-368; Dasent xxx (1599) 3, 4; cf. Dasent xxvii (1597) 180—where the merchants in a petition to the Council complain of damage caused by prohibitions issued to the Admiralty to stay execution of judgment.

[8] Prynne, Animadversions 95, 97; vol. i 554.

[9] Phillips v. Eyre (1870) L.R. 6 Q.B. 28, *per* Willes J.

[10] For a recent illustration of this principle see Kaufman v. Gerson [1904] 1 K.B. 591; of course, the facts relied on by the plaintiff must also give rise to a cause of action in the place where they happened, Phillips v. Eyre (1870) L.R. 6 Q.B. 28, 29.

[11] "Though every fact arose abroad, and the dispute was between foreigners, yet the courts, we apprehend, would clearly entertain and determine the cause, if in its nature transitory, and if the process of the court had been brought to bear against the defendant by service of a writ on him when present in England," Jackson v. Spittal (1870) L.R. 5 C.P. 549, *per* Brett J.



Thus the common law got rid of the difficulties occasioned by the old rules of venue. At the same time it had acquired in the action of assumpsit a convenient and flexible remedy for the enforcement of all kinds of contracts, and, in the action of trover, a convenient action for the enforcement of title to goods. These changes enabled it, not only to claim a share in the commercial business of the country, but even to aim at securing a monopoly of that business, by prohibiting the court of Admiralty from hearing such cases.

According to the theory of Coke and the common lawyers, it was only if a contract was made *super altum mare*, and was to be performed there, that the Admiralty had jurisdiction.[1] But if the Admiralty had been allowed to employ a similar fiction to that employed by the common law courts, this concession might have been used to give it the disputed jurisdiction. The courts of common law therefore denied this liberty to the Admiralty. Their own fictions were untraversable; but the allegation that a contract sued on in the Admiralty was made *super altum mare* could be defeated by a mere surmise of the litigant who applied for a Prohibition.[2] The claims made by the common law to a monopoly of this commercial business were not finally made good till after the Restoration.[3] In the sixteenth and early seventeenth centuries the agreements come to by the judges in 1575 and 1632 conceded to the Admiralty a concurrent jurisdiction.[4] But we should note that these agreements assumed that the common law courts had succeeded in making good their claim to share in this jurisdiction, if the parties chose to bring their action before them.[5] And it is clear that the common law and the common lawyers were beginning to acquire some knowledge of the mechanism of foreign trade, and of the law applied by the merchants to regulate their commercial relations. Thus the edition of William West's collections of precedents published in 1615, which was "newly augmented with divers Presidents touching Merchants' affaires," shows that the common lawyers were becoming acquainted with the usual forms of mercantile documents. These precedents, some of which were written in French, comprise such documents as a charter-party, a sale of a share in a ship, a bill of lading, a bill of exchange, an insurance policy, and a procuration of a merchant to his factor.[6] Similarly in the reports we find cases turning on

[1] Vol. i 553-554, 557.

[2] Godolphin, A View of the Admiral Jurisdiction c. 8.

[3] Vol. i 556-558. [4] Ibid 553, 555-556.

[5] This is expressly pointed out by Jenkins in his argument before the House of Lords in favour of a bill to ascertain the jurisdiction of the Admiralty, which proposed to enact in substance the agreement arrived at in 1632, see Wynne, Life of Jenkins i *lxxxv*.

[6] West, Symboleography, Pt. I. §§ 655-675.

such topics as jettison,[1] average,[2] insurance,[3] charter-parties,[4] mercantile agents,[5] partnership,[6] bills of exchange,[7] merchant's marks,[8] bottomry,[9] freight,[10] the recaption of a captured ship,[11] an agreement to share a captured prize.[12] One effect of the statute of 1624,[13] which is the foundation of our modern patent law, was to make questions as to the validity of a patent, a matter for the common law courts.[14] It is not therefore surprising to find that Malynes recognized that it was desirable for a merchant to know something about the common law decisions.[15]

It was inevitable in these circumstances that the relation of commercial law and custom to the common law should undergo a change. In the Middle Ages, when the commercial customary law was administered in special courts for a very separate body of persons, it was something quite outside the common law.[16] It was therefore necessary to plead and prove as a special custom any particular rule upon which a litigant wished to rely in proceedings before a common law court.[17] But, when the common law courts began to open their doors to commercial cases, it became clear that they must take notice of this customary commercial law, and accept it as part of the common law. A case reported

[1] (1609) 12 Co. Rep. 63.

[2] (1590) Moore K.B. 297; this was a case in the court of Requests, but the reporter clearly thought it was a useful case for a common lawyer to know.

[3] Dowdale's Case (1606) 6 Co. Rep. 47b.

[4] Ibid 48a; (1611) Cro. Jac. 263-264; (1625) Palm. 397.

[5] (1610) 1 Bulstr. 103; (1618) Cro. Jac. 468.

[6] Hackwell v. Brooks (1617) Cro. Jac. 410.

[7] (1602) Cro. Jac. 7; (1613) Cro. Jac. 307; (1621) Winch, 24-25; these are the earliest cases reported, but there is reason to think that earlier cases had come before the courts, see Pt. II. c. 4 I. § 2.

[8] (1618) Cro. Jac. 471, *per* Doddridge J.

[9] (1628) Noy 95; Hob. 11, 12.

[10] (1612) 1 Brownl. and G. 22.

[11] (1611) 2 Brownl. and G. 11.

[12] (1590) 2 Leon. 182.

[13] 21 James I. c. 3; vol. iv 353-354.

[14] See S.P. Dom. (1637) 108, ccclvi 62.

[15] Lex Mercatoria, Pt. I. 76; after giving two decisions on bills obligatory, he says, "These observations at the common law, and such like book cases as I have put down, I hold to be necessary for merchants to know, albeit we handle the law merchant in this treatise, and not matters of the common law."

[16] Vol. i 526, 535, 539; vol. ii. 307, 309-310; the earlier mediæval point of view is illustrated by the following dialogue in Y.B. 21-22 Ed. I. (R.S.) 456-458: "Metingham C.J., He who demands this debt is a merchant; and therefore if he can give slight proof to support his tally we will incline to that side.—Gosefeld, Alas! Sir, we are here at common law; wherefore we are advised that he shall not be received in this Court, inasmuch as he can have his recovery elsewhere by Law Merchants;" but it should be noted that in the Eyre of Kent 6, 7 Ed. II. (S.S.) ii 49, 50 the rules of the law merchant were applied—perhaps because the Eyre suspended the sitting of all courts in Kent, including the mercantile courts; and in 1311, in an action on a sealed tally, Bereford C.J. recognized that "a man cannot use the law of the land in all its points against a merchant," Y.B. 4 Ed. II. (S.S.) 154—even at this early date, it would seem, the common law was beginning to encroach on the sphere of the Law Merchant.

[17] Placitorum Abbreviatio 321, gives a good illustration of the way in which plaintiff and defendant pleaded their different versions of the commercial custom affecting their case.



by Brooke shows that they had adopted this new position at least as early as 1543.[1] In that case a general custom of the merchants had been specially pleaded; and it was agreed that the pleading was bad, because a custom prevailing *inter mercatores per totam Angliam* was common law, and could therefore no more be pleaded than any other general rule of the common law.[2] It followed, to use Coke's words, that, "the Law Merchant is part of the laws of this Realm."[3]

But, in spite of the recognition of the fact that the law merchant was part of the common law, the courts, at the beginning of the seventeenth century, found it much more convenient to allow the customs of the merchants to be pleaded specially.[4] This was due to three closely allied causes. In the first place, because the lawyers were very ignorant as to the exact scope of many of these customs, it was convenient to have them set out in the pleadings. In the second place, though mercantile custom was recognized as being part of the common law, it as yet applied only as between merchants; and it was necessary to state in the pleadings that the parties were merchants.[5] In the third place, the forms of action at common law could not easily be applied to enforce many of the rights recognized by the merchants (e.g. the rights of the different parties to a bill of exchange) except by stating the custom in some detail, and giving an action on the case based upon the custom thus stated. But towards the end of the seventeenth century the courts were able to revert to the position taken up by Brooke and Coke. Their knowledge of mercantile custom was growing greater; and so it was decided

[1] Brooke, Abridgment, *Customs* pl. 59, "Information in Scaccario vers marchant pur lader vine in estrange niefe. Le defendant plede lycence par le roy fait a J. S. de ceo faire, quel J. S. aver graunt son auctoritie inde al defendant, et quod habetur consuetudo inter mercatores per totam Angliam que un poet assigner tyel lycence ouster a un auter et que l'assigne enioyera ceo etc. que fuit demurre in ley, et fuit agre pur ley, que home ne puit prescriber custome per totam Angliam, que si soyt per totam Angliam, ceo est un commen ley et nemye un custome, contra si le custome ust estre plede d'estre in tyel citye ou countye."

[2] Cf. Y.B. 2 Hen. IV. Pasch. pl. 5, cited vol. iii. 386 n. 3.

[3] Co. Litt. p. 182a.

[4] On this matter generally in its application to negotiable instruments see Street, Foundations of Legal Liability ii 347-350.

[5] In Barnaby v. Rigalt (1633) Cro. Car. 301-302, error was assigned because the plaintiff was not shown to have been a merchant at the time of the delivery of the bill of exchange, which was the subject of the action; but judgment was affirmed because he was named a merchant in the declaration; cp. Edgar v. Chut (1663) Keb. 592, where, though it was said that the drawer or payee of a bill of exchange need not be a merchant, it was assumed that the remitter and drawee must be. As a matter of fact, bills of exchange were before this date ordinarily used by Englishmen travelling abroad; thus Evelyn says in his diary, May 6, 1645, "the bills of exchange I tooke up from my first entering Italy till I went from Rome amounted but to 616 ducati di Banco"; and in the Memoirs of Sir John Reresby (Ed. Cartwright 1875) 26, Sir John states that in 1654 he stayed no longer in Paris "than to get my clothes and to receive my bills of exchange."

that it would apply to any mercantile transaction irrespective of the status of the parties.[1] The various actions on the case based on mercantile custom were giving rise to recognized legal rights. It was no longer necessary to set out the custom in order to justify or explain those legal rights, because they were regarded as depending, like any other rights, on the common law.[2]

But though the law merchant had thus become part of the common law, and applicable like any other part of the common law to all Englishmen, it was still a body of customary law. From the earliest period of English legal history the common law judges had exercised the power of refusing to recognize the validity of customs which they considered to be unreasonable. They naturally exercised this power in relation to these commercial customs; and its exercise fixed the limits within, and the conditions under which, they were allowed to become a part of the common law.[3] Thus, we have seen that it was due to this control that the recognition of the status of slavery was not introduced into English law under cover of mercantile custom.[4] In fact, it was a familiar task upon which the common law judges were engaged when they thus set themselves to construct from a basis of commercial custom new branches of the common law. These same judges were in a similar manner constructing our modern law as to copyhold tenure;[5] and their forefathers in the twelfth and thirteenth century had thus laid the foundation of the common law itself.[6]

We naturally ask how these common law judges set about their work of incorporating these commercial customs into the common law. It would appear from the cases that they acted chiefly upon the evidence produced before them as to contents of the commercial custom applicable to the case in hand.[7] Though,

[1] "The law of Merchants is the law of the land, and the custom is good enough generally for any man without naming him merchant," Woodward v. Rowe (1666) 2 Keb. 132; cp. Witherby v. Sarsfield (1690) 1 Show 125; Bromwich v. Lloyd (1699) 2 Lutw. 1525.

[2] Williams v. Williams (1694) Carth. 269, 270.

[3] Cp. Smith, Mercantile Law (11th ed.) Introd. lxxviii-lxxx; as it is there said, these customs "were subjected to certain tests which were not always satisfied—e.g. the test whether they were reasonable, certain, and not arbitrary." Thus "rejecting some . . . affirming others . . . the king's courts . . . did much to put an end to diversity of usages."

[4] Vol. iii 507-508.

[5] Ibid 209-213.

[6] Vol. ii 177-178, 269-270.

[7] "The custom of the merchants is part of the common law of this kingdom, of which the judges ought to take notice: and if any doubt arise to them about their custom, they may send for the merchants to know their custom, as they may send for the civilians to know their law," Van Heath v. Turner (1621) Winch 24; in Pickering v. Barkley (1649) Style 132, which turned upon the question whether capture by pirates was a peril of the sea, a certificate of the merchants that this danger was considered by them to be a peril of the sea was read, and "the court desired to have Gravely, the Master of the Trinity House, and other sufficient merchants to be brought into the court to satisfy the court *viva voce*"; cp. Peirson v. Pounteys (1609) Yelv. 136, "The judges ought to take notice of that which is used amongst merchants, for the maintenance of traffic"; Scarreborrow v. Lyrius (1628), Noy 95—a case turning on the custom that the master can under certain circumstances borrow money on bottomry.



as I have said, they did not hesitate to overrule such customs if they appeared to them to be unreasonable,[1] they always attached the greatest importance to them. In fact they were obliged to do so, as it is difficult to see from what other source they could have derived the rules requisite to decide these cases. Sometimes also they received evidence as to the rules which were applied by the civilians. But they did not treat these rules with quite the same respect as that which they paid to commercial custom. A rule put forward as a commercial custom was more likely to find favour than a rule put forward as a rule of the civil law.[2] Some few lawyers indeed recognized that the legal principles underlying these commercial customs could be learned only from the writings of the foreign civilians. Prynne, at the close of his chapter on the court of Admiralty, cites a long list of writers whose works might profitably be consulted.[3] But these works were not easy for a common lawyer to read; and so they remained unread. It was not till the common law obtained in Lord Mansfield a judge, who was a master of this learning, that the rules deducible from the many various commercial customs which had come before the courts were formed into a coherent system, and completely incorporated with the common law.[4] Even then the destinctive character of the rules of commercial law, and their adaptability to the ever changing needs of new commercial conditions, have caused them to preserve many characteristic features unknown in other departments of the common law.[5]

[1] As in Van Heath v. Turner (1621) Winch 24.

[2] Somers and Buckley's Case (1590) 2 Leo. 182—the Admiralty had refused to allow a plea that an agreement had been entered into to share a captured prize, and the Common Pleas permitted the Admiralty to proceed if it would allow the plea; Bright v. Cowper (1612) 1 Brownl. and G. 22—A merchant, contrary to the rule of the civil law, held not liable to pay freight on goods brought safe to port, because part had been captured by pirates; Bridgeman's Case, Hob. 11, 12—The civil law of the Admiralty expressly followed as to money borrowed by the master on bottomry; in 1712, in Assievedo v. Cambridge, 10 Mod. 771, the civilians argued before the King's Bench as to the effect upon the liability of an insurer of a capture followed by a recapture before the ship had been carried *infra præsidia*.

[3] Prynne, Animadversions 133; besides the English writers of the time, he refers to Straccha, Shardius, Johannes Nider, Edicta regum Franciæ, Renanus Choppinus, Julius Ferretus, Henricus Ranzovius.

[4] Vol. i 572-573; cp. Park, Marine Insurance (1st ed.) xlii-xliv; Smith, Mercantile Law, Introd. lxxxii.

[5] Perhaps the most marked is the efficacy of commercial custom to make new law, as illustrated by the cases which show that a general custom of the merchants to treat certain instruments as negotiable will make them negotiable, vol. i 573 n. 1 this recognition by the courts of the power of commercial custom to do now what it did in the past, is the best security that commercial law will continue to be living law in touch with the real world of commerce; we may remember that Bagehot once

It is clear however that, as early as the first half of the seventeenth century, the process of incorporating the rules of commercial law into the common law had been begun. These rules had ceased to be quite outside the common law. They were recognized as a part of the common law, though as yet they were a separate part of the common law. In many cases it was necessary that their existence should be proved to, and their reasonableness approved by, the judges of the common law courts, before they were enforced as law; and, owing partly to the fact that the common law was very bare of principles applicable to the commercial problems of the day, and partly to the fact that their procedure was ill adapted to the trial of many of these cases,[1] litigants, when possible, avoided the common law courts. But the common law judges were not discouraged by these disadvantages of which, indeed, most of them were hardly conscious. They decided the cases which came before them to the best of their ability; and, owing to the political events of the seventeenth century, which gave them the victory over rival jurisdictions, their decisions have an historical importance which they would not otherwise possess. In them we can see the beginnings of a continuous native development which has shaped the commercial and maritime law used by all English-speaking races at the present day.

During this period therefore the new doctrines of commercial and maritime law were being received through many different channels. We can see the beginnings of the usury laws, the bankruptcy laws, the laws as to negotiable instruments, and trading corporations; we can see the beginnings of the modern law as to ships and shipping, and as to the various incidents of the contract of carriage by sea; we can see the beginnings of the law as to insurance. Of the beginnings of these branches of our modern commercial and maritime law I shall speak more fully in the Second Part of this Book. At this point I shall in conclusion say a few words as to the peculiarities of the development of our English commercial and maritime law which I have been endeavouring to describe.

(3) *The peculiarities in the development of English commercial and maritime law.*

Abroad the outstanding feature in the administration of commercial and maritime law was the existence of commercial and

said about banking, in his Economic Studies 18, that it "goes on growing, multiplying, and changing, as the English people itself goes on growing, multiplying, and changing. The facts of it are one thing to-day and another to-morrow"; and this is true of very many other branches of commerce.

[1] Vol. i 555.



maritime tribunals which were staffed by both merchants and lawyers.[1] It is true that in some countries, e.g. in France, there was a separate court of Admiralty for maritime causes; and that this court had a wide jurisdiction over those commercial causes which arose from or depended upon the contract of carriage by sea.[2] But, even in these countries, other commercial causes were heard by commercial courts of the usual type.[3] The outstanding feature of the law administered by these commercial and maritime tribunals was its dependence, firstly upon the commercial and maritime codes which had been enacted by the governing bodies of the trading centres and the seaport towns of Europe; secondly upon the usages of the merchants which had grown up in these places; and thirdly upon the authoritative treatises in which the lawyers had, with the help of the technical language and the concepts of the civil and canon law, deduced, explained, and applied the principles underlying these codes and usages. Hence we get that international character of the Law Merchant both substantive and adjective, which, as we have seen, has been noted by modern writers as its most marked peculiarity.[4]

In the last half of the sixteenth and the first half of the seventeenth centuries, England stood at the parting of the ways. It was by no means certain that commercial tribunals might not have been established in which the merchants had some share; and it seemed very probable that the English court of Admiralty would acquire a jurisdiction over maritime and commercial causes very similar to that acquired by the French Admiralty. If we look at the evidence for these possibilities, and then inquire why it was they were never realized, we shall be able to understand the reasons for the peculiar manner in which these two branches of law were destined to be developed in this country.

During the last half of the sixteenth century there are many indications that the tribunal which gave the most satisfaction to the merchants was one in which they themselves had some share. The new commercial companies, which were being founded by the crown, sometimes provided for a domestic jurisdiction over the commercial disputes of their members;[5] and Hudson admits

[1] Above 93-96.
[2] Above 101.
[3] Above 95.
[4] Above 60-61.
[5] Thus in 1575, Dr. Lewes, the judge of the court of Admiralty, complained of a falling off in the business of the court; one of the causes of this was, he said, a privilege which merchants trading to Spain and Portugal had got from the Queen enabling them to settle all disputes arising between themselves, or between any of them and a stranger, Select Pleas of the Admiralty (S.S.) ii *xiii*; above 130; for some instances see Carr, Select Charters of Trading Companies (S.S.) 70, 71—charter of merchants trading to France (1602); ibid 85—charter of king's merchants of the new trade (1616); in the charter of the African Company (1672) ibid 191-192, power was given to establish a court, "which court shall consist of one person learned in the civil laws and two merchants," and they were to try cases "according

that in his day the merchants favoured this plan.[1] The merchants who acted as consular agents in foreign lands clearly had some kind of jurisdiction over their countrymen.[2] It is clear, too, from the Council records that the arbitration of merchants, or of a mixed tribunal of merchants and civilians,[3] was a far speedier method of settling mercantile disputes than recourse to any of the ordinary courts.[4] Nor was the legislature wholly blind to this fact. The commissioners, to whom the jurisdiction in bankruptcy was given by the Act of 1571, were usually a tribunal consisting partly of lawyers and partly of merchants;[5] and, to decide disputes arising in London as to insurances, the Act of 1601 created a special court consisting of merchants and civil and common lawyers, not unlike the commercial tribunals of the Continent.[6] Bacon tells us that it had been at first proposed to give this jurisdiction to the court of Chancery; but that another plan had been adopted, both because a suit in Chancery was "too long a course," and because "our courts have not the knowledge of their terms, neither can they tell what to say upon their cases, which be secrets in their science, proceeding out of their experience."[7] During the period of the Commonwealth, also, when many extensive projects of legislative reform were being discussed, the establishment of such tribunals was advocated;[8] and they continued to be advocated throughout this century.[9] If such courts as these had been set up in all the

to the rules of equity and good conscience and according to the laws and customs of merchants"; the Merchant Adventurers at Hamburg had a similar court, S.P. Dom. 1637, 94-95, ccclv, 186.

[1] Above 137 n. 4.

[2] Dasent xviii 201 (1589)—a direction to the consul at Algiers to arrest two fraudulent factors, and their goods, it being stated that the consul has by virtue of his office, authority to relieve English merchants injured in this way.

[3] See e.g. Dasent viii 195 (1573-1574)—Doctors of Civil Law and merchants to arbitrate as to a dispute as to the charges of a merchant's foreign agent.

[4] Above 136 n. 4; cp. vol. iv 261.

[5] 13 Elizabeth c. 7 § 2; Malynes, op. cit. 158; vol. viii 238.

[6] 43 Elizabeth c. 12; vol. i 571; above 135; vol. viii 289-290.

[7] Spedding, Letters and Life of Bacon iii 35.

[8] W. Cole, A Rod for Lawyers, Harl. Miscell. iv 323, "Having often discoursed with lawyers and others about the delays, burdens, and uncertainty of trials at law, I very seldom found any averse to merchants' courts. . . . For what a ridiculous thing is it, that judges in Chancery must determine of merchants' negotiations, transacted in foreign parts, which they understand no better than do the seats they sit on;" in 1658, C. Lamb, a merchant, in a tract entitled "Seasonable Observations humbly offered to His Highness the Lord Protector," Somers' Tracts vi 446, suggested (at p. 458) either that a court of merchants should be established to settle mercantile disputes, or that this jurisdiction should be given to the court for trying insurance cases established in 1601.

[9] Marvel, Works ii 88, tells us that in 1663 a bill was introduced "for transferreing the trialls of all forain contracts relating to Navigation from the common law to the court of Admiralty. But after two days serious and earnest Debate, the bill was rejected, and another ordered to be brought in: the sense of the House inclining to think, that those things may better be redressed by the law merchant, or lex mercatoria and by courts of Merchants to be erected in some few of the



important trading centres, and if their jurisdiction had been extended to all commercial causes, the civilians and the merchants would probably have introduced many of the principles of continental law with which they were familiar. It is obvious that, if this had happened, the whole course of the history of these branches of law would have been altered.

But, in spite of their obvious advantages, commercial tribunals of this type were never developed in England. This was due to two closely allied causes. Firstly the towns—even London—were very much less independent in England than abroad; and secondly England had a far greater number of royal courts possessing a general jurisdiction throughout the country.

(1) It was in the independent cities of Italy, Spain, the south of France, the Netherlands, and Germany that these commercial tribunals made their appearance.[1] Though their jurisdiction was wide, the area over which that jurisdiction was exercised was limited. And it was this limitation of area which made the exercise of their wide jurisdiction possible. The merchants who sat in them would not have had the leisure to deal with the numerous cases arising over a large area; and the merchants who were litigants would not wish to waste their time in travelling to a distant tribunal. The courts of these cities would have lost their usefulness, if they had ceased to be courts for one limited locality. The statute which created the court to try cases for insurance recognized this when it limited its jurisdiction to cases which arose in London. But, seeing that in England all the larger litigation had, by the last half of the sixteenth century, been absorbed by the central courts, the towns had no active judicial bodies which were capable of being adapted in this way. Abroad it was in and through the judicial machinery of the towns that these tribunals grew up.[2] In England there was no municipal tribunal sufficiently independent to evolve from within itself a commercial court after this new pattern.

(2) From the beginning of the fourteenth century onwards the growth of royal central courts had been steadily reducing to insignificance all local jurisdictions. During the sixteenth century the process had been accelerated by the increase in the jurisdiction of the Council and its offshoots, the Star Chamber, the Chancery, and the Admiralty. The Council might send a case to arbitration. The crown might give jurisdictional powers to a company. But it was not likely that the crown or the Council would permanently delegate jurisdiction to a municipal

considerablest ports of the nation;" see also Child, A New Discourse of Trade (1694) 6, 131.

[1] Above 68-71, 95.

[2] Ibid.

tribunal. On the contrary, as the sixteenth century advanced, the jurisdiction of all these central courts tended to expand, and the competition for business became fiercer. The Admiralty, especially, was very jealous of towns which, under cover of old charters, claimed and exercised jurisdiction which competed with itself.[1] And, on the whole, it was as well that the central courts adopted this attitude. The towns had so long been under the control of royal courts of many different kinds that it is doubtful whether, even if they had been given the power, they would have had the capacity, to develop and to work new institutions able to deal with the new commercial and maritime problems of the day.[2]

It therefore seemed likely, at the end of the sixteenth century, that the court of Admiralty would supply the place of these commercial tribunals. It is true that it was not wholly satisfactory to the merchants. It was a court in which the merchants had no part; and we can see from what happened abroad that a court staffed wholly by professional lawyers, whatever law it administered, was not very popular with the merchants.[3] In the Council records there are many complaints of its delays;[4] and to avoid its delays and the delays of other courts directions were sometimes given that cases should be submitted to the arbitration, sometimes of merchants, and sometimes of both lawyers and merchants.[5] That these complaints were well founded is obvious if we look at the lengthy civil law procedure there used.[6] It

[1] Thus, when London attempted to acquire jurisdiction over foreign commercial causes to the prejudice of the Admiralty, they were rebuked by the Queen, "Whereas," she wrote, "we are given to understand . . . that you take upon you to heare and determine all manner of causes and suits arising of contracts and other things happening as well upon as beyond the seas . . . the knowledge whereof doth properly . . . belong . . . unto our court of Admiraltie, fayning the same contrary to truth to have been done within some parish or woarde of that our citie of London . . . we thoughte it meete straightly to charge and command you to forbeare to intermeddle etc."; this letter was sent in 1598, and a similar letter was sent in 1604, Marsden, Admiralty Cases 232-233; cf. Select Pleas of the Admiralty (S.S.) ii *xix-xxi* for the relations between the Admiralty and seaport towns claiming exemption from its jurisdiction. Similarly we meet claims to be exempt from other central courts; thus in 1595 the Cinque Ports claimed exemption from the equitable jurisdiction of the Chancellor; but it was pointed out that "the High Court of Chancery has the disposition of Her Majesty's own pre-eminent equity and absolute judgment, from which no subject can be exempt," State Papers Dom. (1595-1597) 138, cclv 1.

[2] Thus in 1582, in consequence of the frequency of piracy, Elizabeth suspended the Admiralty jurisdiction of all towns for three years, Select Pleas of the Admiralty (S.S.) ii *xvi*.

[3] Above 94-95; the Act of 43 Elizabeth c. 12 shows that it was not regarded as a satisfactory tribunal for the trial of insurance cases; Mr. Marsden says, Select Pleas of the Admiralty (S.S.) ii *lxxx*, that, till the middle of the eighteenth century, these cases were generally settled by arbitration or by some domestic tribunal.

[4] See e.g. Dasent v 250, 251 (1555); vii 23 (1558); xiii 343 (1581-1582); xx *xv*, *xvi* (1590-1591); xxvii 94, 121-122 (1597).

[5] Dasent xxiii (1592)—an entry which shows that a judicial hearing was a much more lengthy affair than an arbitration; cp. ibid iv 92 (1552); ix 40 (1575); xvi 392-393 (1588); xviii 26 (1589); xxii 158-159 (1591).

[6] Above 138 n. 6; below 153.



was, it is true, proposed in 1566 to give the judge of the court of Admiralty statutory powers to hear certain commercial causes "summarie et de plano et sine strepitu et figura judicii, sola facti veritate inspecta, omnique appellatione remota"[1]—to make it, in other words, a commercial court with the summary procedure used in continental commercial courts. But nothing came of this proposal, and the procedural defects of the court remained unremedied. But, in spite of this, we cannot doubt, that, from the point of view of the substantive law which it administered, it was a more satisfactory tribunal than either the courts of common law or even the court of Chancery, because, as we have seen, neither of these courts administered that maritime and civil law with which the merchants were familiar; and neither possessed the peculiar machinery needed to do justice in maritime causes.[2] If the agreements as to the jurisdiction to be allowed to the Admiralty arrived at in 1575 and 1632[3] had been adhered to, there can be little doubt but that the Admiralty would have become the tribunal in which the law merchant was principally administered.

That the Admiralty never developed into such a court is due perhaps in part to the fact that it was not wholly satisfactory to the merchants, but chiefly to political causes. The Tudors never succeeded in settling the boundaries of the jurisdiction of the various courts new and old which administered the various parts of English law in the sixteenth century; and the issue of the political controversies of the seventeenth century was fatal to all those courts to which either the common law or Parliament were hostile. It is true that they were hostile to the court of Chancery; but that court had established its position before these controversies had become acute; and it therefore survived them.[4] Consequently, after the Great Rebellion, the ordinary courts of law and equity acquired complete jurisdiction over commercial causes, and by far the greater part of the jurisdiction over maritime causes. Therefore in England alone among the nations of Europe commercial and maritime law became simply a branch of the ordinary law, founded indeed on those principles and rules of the cosmopolitan Law Merchant which were introduced into England during this period, but developed by the machinery and in the technical atmosphere of the courts of law and equity. It was therefore developed by men who knew very little of that great body of law and legal theory which on the Continent had

[1] Select Pleas of the Admiralty (S.S.) ii *xiii*, *xiv*; for the meaning of these terms see above 81-82.

[2] Above 134, 138-139.

[3] Vol. i 553, 555-556.

[4] Vol. i 463-465; below 217, 236-238.

grown up and was still growing up around these topics.[1] Mr. Marsden tells us[2] that, "many points of maritime law that were afterwards painfully elaborated by the common lawyers had for at least a century been familiar to the civilians. . . . General average, insurance, and the negotiability of bills of exchange . . . all matters of rare occurrence in the Westminster courts during the Elizabethan and Stuart period, were very frequent in the Admiralty. The Westminster Courts elaborated their law upon these and many other points of commercial law, without much reference to the previous decisions of the Admiralty. Nevertheless the common law, with tardy steps, followed the Admiralty in many of its decisions, perhaps unconsciously, and certainly without acknowledgment. Sir Mathew Hale is careful to point out that the common law courts, as well as the Admiralty, administered the civil law, so far as, by the law of England, the civil law was applicable to maritime cases; and the supremacy of the former being established, the decision as to what was the law of England was necessarily in their hands." Hence in England the growth of commercial and maritime law was slow; and though the actual rules in many cases agreed with, and were in fact founded on the law laid down by the continental civilians, at many points they diverged from continental usages. With the beginnings of this native development of commercial and maritime law through the courts of law and equity I shall deal in the Second Part of this Book.

We must now turn to those other legal developments outside the sphere of the common law which are less directly connected with the civil law.

[1] See Pepys' Diary (Ed. Wheatley) iii 364 for an amusing account of a trial in 1663 of an action on a policy of marine insurance in the King's Bench, in which the court displayed an entire ignorance of the meaning of ordinary nautical language and commercial terms, "To hear how sillily the counsel and the judge would speak as to the terms necessary in the matter, would make one laugh."

[2] Select Pleas of the Admiralty (S.S.) ii *lxxx*.

CHAPTER IV

# ENGLISH LAW IN THE SIXTEENTH AND EARLY SEVENTEENTH CENTURIES (*Continued*)

## DEVELOPMENTS OUTSIDE THE SPHERE OF THE COMMON LAW (*Continued*)

IN this chapter I shall deal firstly with the law administered by the Council and the Star Chamber, and secondly with the equitable jurisdiction of the Chancellor.

## I

## THE LAW ADMINISTERED BY THE COUNCIL AND THE STAR CHAMBER

The functions of the Council and Star Chamber were twofold—executive and judicial. No doubt in the work of the Council executive functions predominated, and in the work of the Star Chamber judicial functions; but we have seen that they were to a great extent staffed by the same men,[1] and that the separation between the bodies themselves and their work was never quite complete.[2] As executive bodies they had a large influence upon the development of public law, and upon the commercial and industrial policy of the state; and they used their wide judicial powers to create a considerable amount of law upon these topics. Of this part of their work I have already said something,[3] and I shall have something more to say of it in the next chapter.[4] But this part of their work naturally led them to extend their jurisdiction to other cognate topics. At all times the effective administration of the criminal law is intimately connected with the good government of the state. We have seen that the anarchy of the fifteenth century was largely due to the failure of the common law to administer it effectively;[5] and that therefore, in the sixteenth and early seventeenth centuries, the interference of the

[1] Vol. i 500; vol. iv 60-61, 63.
[2] Vol. i 502.
[3] Vol. iv 85-88, 273-274, 335-338, 343-354, 377-379, 381; above 136-137.
[4] Below 421-423.
[5] Vol. ii 414-416.

Council and Star Chamber was urgently needed.[1] The success achieved by these bodies was no doubt mainly due to the facts that they comprised among their members all the leading statesmen of the day, and that they acted as the immediate agents of the king's prerogative. But it is also in part due to another and a more purely legal reason—the system of procedure which they employed. It was through this system of procedure that they were able to develop many new branches of the criminal law; to punish many kinds of sharp practice, and many attempts to use the procedure of the common law and other courts as an instrument of oppression; and to exercise occasionally a civil jurisdiction in cases in which the rules of the common law worked or were made to work injustice. It is with these more purely legal developments that I shall deal in this chapter.

In this part of their work the Star Chamber was more important than the Council. All through this period it was gradually developing many of the characteristics of a court of law. The chief justices and other lawyers were generally present.[2] It was acquiring a staff of officials.[3] Its rules of procedure and pleading were beginning to attain fixity.[4] Like other courts of justice, and unlike the Council, it heard cases in public. In 1589 Manwood C.B., pointed out that it would be fairer to himself that the complaints against him should be heard by the Star Chamber rather than by the Council, both because lawyers were always present in the Star Chamber, and because the hearing there was public.[5] The publicity of its sittings, as contrasted with the Council, is attested by Bacon,[6] and by other writers.[7] It would not of course be true to say that the Council did nothing to assist these legal developments. But it is clear that, owing to the judicial characteristics which the Star Chamber was acquiring,

[1] Vol. i 491-493, 507-508; vol. iv 25, 53, 190.

[2] Vol. i 500; vol. iv 270 n. 7.

[3] Vol. i 500.

[4] Ibid 501; below 178-184.

[5] "Myself having byn a publique person in place of Justyce above xxxty years for the peace, and thereof above vi yeares a Judge in the Common Place, and above xi yeares Cheyffe Baron of the Exchequer and (in two greate Cyrcutes of the Realme a judge above xviitene yeares) not to be convynced nor displayced nor disgracyed but by due order in a Publique courte of Justyce. . . . My Lords and others of her Matyes counsell for the moste parte have not study or Judgment of lawe, and but small experyence of law to dyscusse what ys an offence of lawe and what not, unles they be assysted by the Judges and the Quenes lerned counsell as in the Star Chamber they be and here not," Lansdowne MS. 59, Art. 64, cited Scofield, A Study of the Court of Star Chamber 43; for Manwood's offences see vol. i 505.

[6] Spedding, Letters and Life vii 70, 71, 289, "it is a supreme court of Judicature ordinary; it is an open council."

[7] Strype, Grindal 348 (cited Scofield, op. cit 59 n. 4). "Her Majesty findeth it expedient to have the world understand her actions in this matter; and also to have the archbishop's misdemeanours declared and to call him to answer the same. Therefore he is to answer hereunto in that open place"—i.e. the Star Chamber.



it is mainly to that court that we must look for the legal developments with which we are here concerned.

The fact that the Star Chamber was becoming a judicial court which was making law, is clear from its records, from the reports of its proceedings, and from the books describing its organization and jurisdiction which were beginning to make their appearance in the legal literature of the latter part of this period. I shall therefore say a few words about these records, reports, and books before describing the manner in which its actual work influenced the development of English law.

(1) The records, reports and books.

When we apply the term "records" to the proceedings of the court of Star Chamber we are using it in a sense which was technically incorrect in the sixteenth century, and is perhaps technically incorrect at the present day. Such courts as the Star Chamber, the Council, the Chancery when acting as a court equity, and the Admiralty, did not technically keep "records"—they were not courts of record.[1] But the technical conception of a court of record was not ready made. It was of slow growth; and owes, it seems to me, some of its modern sharpness of definition to that rivalry between the new courts and councils of this period and the courts of common law, which was beginning to become acute at the latter part of the sixteenth century. Of the growth of this technical conception, therefore, I shall here speak shortly, because it illustrates both the new position which these courts were taking in the state, and the attitude of the common law courts to them.

"The distinction," says Maitland, "that we still draw between "courts of record" and courts that are "not of record" takes us back to very early times when the king asserts that his own word as to all that has taken place in his presence is incontestable. This privilege he communicates to his own special court; his testimony as to all that is done before it is conclusive."[2] Thus the formal records of the king's court cannot be disputed; and herein it differs from inferior courts, which keep no such formal records.[3] They may be called on by writ

[1] "A court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony; which rolls are called the records of the court, and are of such high and supereminent authority, that their truth is not to be called in question," Bl. Comm. iii 24; cp. Baldwin, Select Cases before the Council (S.S.) xi, xii.

[2] P. and M. ii 666.

[3] "Sciendum tamen quod nulla curia recordum habet generaliter præter curiam domini regis. In aliis enim curiis si quis aliquid dixerit unde eum pœnituerit, poterit id negare contra totam curiam tertia manu cum sacramento, id se non dixisse vel cum pluribus vel cum paucioribus secundum consuetudinem diversarum curiarum," Glanvil viii 8; in certain matters however other courts might have records e.g. if battle were

of false judgment to produce a record of a given transaction; but this record may be disputed—the doomsmen who have brought up the record may even, in early times, be compelled to fight in its defence.[1] It is the infallibility of its formal record which is the earliest mark of a court of record. But gradually the court of record developed other characteristics. Its record was kept upon a parchment roll. The method of questioning its decisions was a writ of error, while the method of questioning the decisions of courts not of record was a writ of false judgment.[2] It alone could fine and imprison; and this characteristic, which was perhaps one of the latest to be developed,[3] is its most important characteristic at the present day.[4]

It is clear that courts which possessed these characteristics had many advantages. In the Middle Ages the common lawyers found that they gave both to their central courts and to other royal courts,[5] considerable assistance in their struggle with competing local jurisdictions. Therefore they dwelt upon and elaborated them, and thus made the distinction between a court of record and a court not of record a technical distinction. And, as often happened in the fourteenth and fifteenth centuries, the lawyers, without altogether losing sight of the fundamental principle upon which the technical distinction was based,[6] tended to lay most stress upon the manner of keeping the record and upon the other consequences which the status of a court of record

waged a record was kept of this per assisam domini regis, ibid; "item recordum habet comitatus de pledgiis vel plagis datis et receptis in ipso comitatu vel similibus," ibid viii 10.

[1] P. and M. ii 664, 666, 667; this was not so in Glanvil's day; the suitors might be compelled to fight in defence of the judgment of the court, but not in defence of the correctness of its record, Glanvil viii 8; vol. i 308; but apparently the records of these local courts would, if certified under the Great Seal, become true records, Y.B. 6, 7 Ed. II. (S.S.) xxv-xxvii.

[2] P. and M. ii 664, 665; Co. Litt. 117b.

[3] Below 159 n. 3.

[4] Halsbury's Laws of England, *Courts*, pp. 9, 10.

[5] That other royal courts, besides the central courts of common law, were regarded as courts of record is clear from Y.B. 10 Hy. VI. Mich. pl. 22; in that case a court leet was considered to be a court of record; but Coke, in Godfrey's case (1615) 11 Co. Rep. at p. 43b drew a further distinction between courts, like the central courts of common law, which could both fine and imprison, and courts, like courts leet, which could fine but not imprison; and he laid it down that the true court of record must be able both to fine and imprison; I have not been able to find any authority for this, see below 159 n. 3; and Prof. Hearnshaw, Leet Jurisdiction in England 134, thinks that Coke was the first to lay it down that the leet could not imprison; Coke's view does not seem quite consistent with his statement in Co. Litt. 117b where he says that, "Every court of record is the king's court albeit another may have the profit"; the court leet was the king's court of which another had the profit, vol. i. 134-137.

[6] Thus Coke, Second Instit. 71 says, "It is called a record, for that it recordeth or beareth witness of the truth. . . . It hath this sovereign privilege that it is proved by no other but by itself"—the infallibility of the king is communicated to the records of his court.



had come to involve. Thus the *Termes de la Ley* defines a court of record simply by reference to the formal characteristics of its records;[1] a Year Book of Henry VI.'s reign emphasizes the fact that unless a court is a court of record no writ of error lay to correct the mistakes which it has made;[2] and Coke deduced from certain vague dicta in the Year Books as to the powers of courts of record the new rule that it was only a court of record which could fine and imprison.[3] As we have seen,[4] the Doctor and Student attached another and a more important consequence to the possession by a court of a formal record. Unless it had such a record the law laid down by it could not be considered as a part or a ground of the law of England.

Now it was only the courts of common law, or other royal courts which proceeded in accordance with the rules of the common law, which kept a formal Latin record enrolled on parchment. It followed that all the newer courts which the common lawyers regarded as their rivals—the Council, the Star Chamber, the Chancery acting as a court of equity, the Admiralty, the ecclesiastical courts—were not courts of record.[5] And, if Coke's view that only a court of record could fine or imprison was correct, these courts had no legal right to exercise such powers.[6] Coke's view was obviously designed to cripple these rival courts;[7]

[1] "Record est un Escript en Parchment, ou sont enroll Pleas de Terre, ou Common Pleas, Faits, ou Criminal Proceedings en ascun Court de Record; mes en Courts nient de Record come Admiraltie, Courts Christian, Courts Baron, etc., lour Registrie de Procedure ne sont proprement dits Records: Mes courts de Ley teign per Grant del Roy sont Courts de Record," Termes de la Ley *sub voc.* Record.

[2] Y.B. 37 Hy. VI. Hil pl. 3 (p. 14), Prisot said, "Il est a voir al queux choses en Chancery on convient respondre illonques, issint que on poit avoir breve d'Error, et en queux nemy: Sir, en touts ples devant eux sur Patents, ples en Det, et hujusmodi, perentre eux del Place, la on avoit brief d'Error . . . mes en user des breves del Subpona il n'est court de Record en eux cases, car il est forsque d'examiner le conscience."

[3] Coke makes a great point of this in Beecher's Case (1609) 8 Co. Rep. at p. 60b; and in Godfrey's Case (1615) 11 Co. Rep. at p. 43b; it seems to me that, with regard to the power to fine, he had a certain amount of authority in dicta such as those contained in Y.BB. 7 Hy. VI. Mich. pl. 17, and 10 Hy. VI. Mich. pl. 22 *per* Candish; and in F.N.B. 73 D; but the dicta are not very explicit, and the court is clearly thinking primarily of the distinction between an amercement which is affeered by the suitors, and a fine which is assessed by the judge, and not of a distinction between a court of record and a court not of record; it seems to me that Coke used these cases to give, if not a wholly new meaning to the latter distinction (see Y.B. 10 Hy. VI. Mich. pl. 22 *per* Newton) at least a new emphasis to it; with regard to the power to imprison the conclusion is contradicted by Y.B. 37 Hy. VI. Hil. pl. 3 (p. 14) where Prisot distinctly says that the court of Chancery, though not a court of record when acting as a court of equity, has this power; for other similar misstatements of Coke made with a view of magnifying the powers of the common law courts see below 431-432, 476-478.

[4] Vol. iv 282 n. 4.

[5] Coke, Second Instit. 71; Fourth Instit. 135; Godfrey's Case (1615) 11 Co. Rep. 44a.

[6] As to the correctness of this view see above n. 3.

[7] On the passage in Godfrey's Case (1615) 11 Co. Rep. 44a, in which he denies that the Ecclesiastical courts are courts of record, the writer of the Observations on Coke's Reports (for this work see below 478 n. 1) at p. 6, justly remarks that the point did not

and in *Floyd and Barker's Case* he further strengthened the position of the common law courts by deducing from their status of courts of record the consequence that their judges could not be questioned for anything which they did by the court of Star Chamber.[1] It is clear that he was exaggerating this technical distinction in order to use it as one of the foundations of his arguments for the supremacy of the common law,[2] and as a means to depress such rival courts as the court of Admiralty, and the ecclesiastical courts. Thus for political reasons the distinction gained an importance for which, historically, there was no warrant; and though these political reasons for its importance disappeared after the seventeenth century, it remained as technical distinction between courts. It still exists; but at the present day it is of little practical importance.[3]

During this period Coke's views had little or no effect. The power to fine and imprison was habitually exercised by the Council, Star Chamber, Chancery, Admiralty, and High Commission. Indeed this power was absolutely essential to their efficiency, and, historically, was abundantly justified. They were just as much royal courts as the courts of common law—as we have seen, during the greater part of the fourteenth century, King's Bench and Council were intimately related; and the Council could control the proceedings of the King's Bench.[4] In this period, indeed, the relations of these courts with the crown were a good deal more intimate than those of the courts of common law; so that they obviously came well within the original principle which had given to the courts of common law their superior status of courts of record. It is true that they did not comply with the later technical tests of that status. But their organization and procedure were almost as definite and settled as the organization and procedure of the courts of common law; and, though they kept no Latin records enrolled on parchment, they kept formal English records of a more adequate kind than

arise for decision, and that his words, "extend not only to the Bishops' Courts, but to the High Commission, the Provincial Councils, the Admiralty, the Court of Requests, and the authority of the Council Table itself."

[1] (1608) 12 Co. Rep. at p. 25, "Insomuch as the judges of the realm have the administration of justice under the king to all his subjects, they ought not to be drawn into question for any supposed corruption which extends to the annihilating of a record or of any judicial proceeding before them . . . except it be before the king himself; for they are only to make account to God and the king, and not to answer to any suggestion in the Star Chamber."

[2] Below 428-433, 439-440.

[3] "Wherever desirable courts have been made courts of record by statute," see Halsbury's Laws of England, *Courts* 10 n. (*m*); for the statutes making the Admiralty a court of record see vol. i 547, 558-559.

[4] Ibid 209-210.



those of the common law courts.[1] The absurdity of making the possession by a court of a Latin plea roll the crucial test of its possession of the status of a court of record was justly and forcibly pointed out by Shower in his argument in *Rex* v. *Berchet*.[2]

We have seen that in the course of the fourteenth and fifteenth centuries the Council tended to make more use of the writs and processes of the Privy Seal, and less use of the writs and processes of the Chancery, because the former were less formal, more expeditious, and more secret than the latter.[3] We have seen that for this reason the former were used by the Council in criminal or semi-criminal cases, while the latter were used in civil cases; and that this difference in process had a large influence upon the separation of the jurisdiction of the Council from that of the Chancery.[4] But the process of the Privy Seal had the defects of its qualities. The records of the office of the Privy Seal were carelessly kept.[5] It was not until the time of the Tudors that they were collected into bundles;[6] and the tradition of carelessness remained. Hudson tells us that at the beginning of the seventeenth century, the carelessness with which the records of the court were kept, and their informality, were leading many to the conclusion that the court was "rather a committee for such great causes as it pleased the king than a court of ordinary justice."[7] But he points out that the court was careful to correct "the neglect of convenient form in him which complaineth;"[8] and that the existing carelessness both in the custody and in the writing of the records of the court was of recent date, and was due partly to the age of Mills the clerk of the court, and, after his time, to the practice of entrusting the office to inexperienced deputies.[9] However that may be, the

[1] For the inadequacy of the formal record as an account of the most material parts of the trial see vol. i 215-216, 317.

[2] (1691) 1 Shower at pp. 119, 120—"Some will have the Star Chamber no Court of Record, because their proceedings are in English. But if that were an objection, then all the ancient Parliament Rolls and Acts of Parliament before Henry the Sixth which are mostly enrolled in French, not in Latin, and many charters, writs, and commissions enrolled in French; and the statutes since the first of Henry the Sixth, must be no records."

[3] Vol. i 407-408; Baldwin, The King's Council 254-261.

[4] Vol. i 407-408.

[5] "Characteristically of the methods of this office these [records] were briefly written, sparing of parchment, showing no sign of arrangement or care for their preservation," Baldwin, op. cit. 263.

[6] Ibid.

[7] A Treatise on the Court of Star Chamber, Collect. Jurid. ii 5.

[8] Ibid 6; this is borne out by Hawarde, Les Reports, etc., see e.g. pp. 46, 54, 61, 82, 91.

[9] Hudson, op. cit. 6, 7—"This negligence hath crept into the court of very late time, either in Mr. Mills' age, or since the office hath been executed by many deputies, one being thrust out by that time he understandeth the duties of the place, and another put in altogether unexperienced; yet in former times the judgments

records of the court were allowed to remain in a state of chaos till our own days. In spite of recent efforts to sort and calendar the records, papers belonging to different cases and different reigns have been found together. Leadam tells us that "isolated papers belonging to suits of the period of Henry VII. are found sorted and indexed as parts of suits belonging to that of Henry VIII."[1] And, as he says, "confusion is by no means the most deplorable incident in the history of these records."[2] The whole of the decrees of the Star Chamber have disappeared;[3] and that means that we have lost the whole of the first hand evidence as to the judgments given by the court, and the only means of checking the accuracy of contemporary reports of its proceedings. At the same time the Calendars prepared by the record office enable us to see the kind of cases which from time to time came before the court;[4] and the records of the earlier part of this period, published by Leadam, enable us to form some conclusions as to its procedure and as to the law which it administered. A useful supplement to the records is to be found in the collection of forms of pleading for use by suitors in the court published by William West in his Symboleography.[5]

The loss of the decrees of the court is to some extent remedied by the contemporary reports of its proceedings. As in the case of the courts of common law,[6] so in the case of the courts of Star Chamber and Chancery, the lawyers found it necessary to make reports of their proceedings for themselves. And, as is the case with the reports of cases in the common law courts, these reports often tell us a great deal more about the law administered by the court, and the principles upon which it was based, than the formal record. The existence of these reports of the proceedings of the Star Chamber and the Chancery shows more clearly than anything else the barrenness of the distinction drawn by the courts of common law between courts of record and courts not of record. The fact that these courts were royal courts, of at least as great importance as the courts of common law is decisively proved by the need which the lawyers found

before the king and his council were kept in such care, and remain in such order, as no records of the kingdom are of more use than those remaining in the Tower of London."

[1] Select Cases in the Star Chamber (S.S.) i *xi*. [2] Ibid.

[3] Ibid; in 1719 a committee of the House of Lords reported that "the last notice of them that could be got was that they were in a house in St. Bartholemew's Close, London."

[4] For these calendars see the 49th Rep. of the Deputy Keeper of the Public Records 376-377; and for a calendar of a large number of cases of Henry VIII.'s reign see ibid 377-594; Les Reportes, etc. Introd. lii.

[5] (Ed. 1618) Pt. II. 337-350b; see ibid 311-336b for similar precedents for the Court of Wards and Liveries; for William West and his book see below 273-274, 389-390.

[6] Vol. ii 536-541.



for making reports of their proceedings.[1] Probably if the court of Star Chamber had not ceased to exist in 1641 a series of Star-chamber reports, as bulky and as numerous as the reports of the court of Chancery, would be an essential part of every law library. As we shall see, the earliest printed reports of this court are fuller than the earliest printed reports of the court of Chancery.[2] Probably the publication of some of these reports, which still exist in MS., would tell us a good deal more about the law administered by the court than the publication of an equal bulk of the surviving records—just as the publication of Year Books serves a far more useful purpose than the publication of the formal plea rolls.

The most complete set of Star Chamber reports, which have yet been published, are those made by J. Hawarde, which run from January 25th, 1593, to February 14th, 1609.[3] This collection, which has been edited by Baildon, comprises a few cases in other courts in which the author was interested,[4] but consists in the main of cases heard before the court of Star Chamber. Probably, Leadam thinks, the cases were written up from rough notes taken in court.[5] The earlier part of the book shows signs of careful editing; but the latter part, when it can be checked from other sources, is somewhat careless and inaccurate—notably the account of the judgments in *Calvin's Case*. It is, however, the fullest report we possess of the doings of the court; and both the arguments and the judgments give us a valuable account of the way in which the business was conducted, and of the principles which the court applied. The book shows us that the court was truly a judicial court, and a court of criminal equity. The cases were regularly and publicly heard; and the parties were represented by counsel.[6] The law applied was based upon the common law;[7] but the procedure of the court enabled it to disregard many of those technical common law rules which

[1] D'Ewes, Autobiography i 220 tells us that in Michaelmas term 1622 he began "to go to the Court of Star Chamber on Wednesday and Friday in the forenoon, and to take notes of such cases as I heard there adjudged"; we may safely conjecture that other law students did the like.

[2] Below 276-277.

[3] Les Reportes del Cases in Camera Stellata; the book is hard to get as it was privately printed; it is so valuable as an account of the actual work of the Star Chamber, and as an authority upon the actual administration of the public law of the period, that it would be well worth reprinting as a volume of the Selden Society.

[4] Introd. viii; pp. 139-143, 168, 230-232, 338-341, 349 seqq.

[5] Introd. vii. [6] See e.g. pp. 2, 14, 38, 46.

[7] See pp. 24-25—rules are laid down by the Chief Justices as to bail and arrest; 27—a plea to the jurisdiction is referred to the Chief Justices; 63—a case is referred to the common law; 128-129—counsel is rebuked for citing common law cases which do not apply; 154—a case is remitted to a trial at common law; 261—legal argument as to the power of the crown to grant the forfeiture of penal laws; 325—a lecture on serving process by the Lord Chief Justice.

rendered the administration of the criminal law ineffective.[1] The judges of the court did not hesitate to develop and expand the principles of the criminal law in a way in which no common law judge would have dared to attempt.[2] The only other separate collection of reports which we possess are a series of cases printed by Rushworth which are taken from the years 1625-1637;[3] and a set of reports for the year 1631-1632, which have been printed by the Camden Society.[4] There are also a few cases heard in the court of Star Chamber reported in Dyer, Coke, Plowden, and one or two of the other common law reporters.[5]

The importance of the court induced lawyers not only to report its proceedings but also to write books about its constitution, procedure, and jurisdiction. Of these books by far the most important is the treatise of William Hudson. Hudson was a barrister and bencher of Gray's Inn, whose practice was chiefly in the court of Star Chamber. His active career lies between 1605,[6] when he was called to the bar, and 1635 when he died. As we might expect, he was identified with the lawyers who supported the prerogative. He subscribed the information against Eliot and others for riot in the House of Commons in 1629, and he opened the case against Prynne for publishing his Histrio-mastix in 1632-1633. His fame rests entirely on his book, which gives an impartial and scholarly survey of the history constitution jurisdiction and procedure of the court, based upon its records and upon his own observations.[7] It is a survey which is the more valuable because the author had access to records

[1] On occasion they would disregard even their own rules of practice; thus at p. 149 the Lord Keeper said they could make an order "Even if it be not the course of the court; for in such great cases, in which there was great mischief, and it was so necessary for the public good, a precedent was not necessary to direct them, but they could make an order according to the necessity and nature of the thing itself"; cf. p. 103, where they dealt with a case of riot because the country would not find it; at p. 292 the Lord Chancellor says, "exorbitante offences are not subjecte to an ordinarye course of lawe."

[2] Illustrations may be seen in the way in which they dealt with officials who had misbehaved or neglected their duties, vol. iv 77-80; or with informations for the breach of proclamations, pp. 79, 318, 319, 328; or with such offences as riot, conspiracy, libel, and various forms of fraud, below 197-213.

[3] Historical Collections, Pt. II. vol. ii App. 1-75.

[4] Cases in the Courts of Star Chamber and High Commission; the cases in the former court are at pp. 1-180.

[5] For these reports and the reporters of this period see below 355-374.

[6] Pension Book of Gray's Inn 176; called to be of the grand company in 1622, ibid 246; chosen assistant reader in 1623, ibid 261, and reader in 1624, ibid 267; dean of the chapel in 1630, ibid 298.

[7] It is stated in Collect. Jurid. ii p. 1 n. that the MS. of this treatise, contained in Harl. MSS. no. 1226, contains the following memorandum signed by Finch, Chief Justice of the Common Pleas and Lord Keeper in Charles I.'s reign:—"This treatise was compiled by William Hudson of Gray's Inn esq.; one very much practised, and of great experience in the Star Chamber, and my very affectionate friend. His son and heir Mr. Christopher Hudson (whose handwriting this book is), after his father's death, gave it to me 19 Dec. 1635."



which are now lost to us. That he used these records with skill is clear from the fact that his view of the origin of the court is substantially endorsed by Leadam.

His account of the actual constitution, jurisdiction, and procedure of the court is no mere lifeless description. It is always enlivened and substantiated by the cases which he cites, either from the records or from his own practice and observation.[1] He is a discriminating critic of developments of which he does not approve—the neglect of the records,[2] the length of the interrogatories administered to a defendant,[3] the abuse of the procedure *ore tenus*.[4] But he has all the reverence of the Tudor lawyer for the greatness and dignity of a court which, because it administered the personal and direct justice of the king[5] without the excessive technicality which impaired the usefulness of other courts, could be called "*Schola Reipublicæ*"—the controller both of "all the other courts of justice and ministers thereof, and of all the subjects of the kingdom."[6] At the same time he lets us see that in his day the court was beginning to excite a legal and a constitutional opposition which was almost unknown in the sixteenth century.[7] In fact his consciousness of the growing opposition between the Star Chamber and the common law courts may have led him to gloss over some of its characteristics, and to suggest changes with a view to palliating a rivalry which was daily growing more acute. He entirely suppresses the fact that it used torture to extort confessions and information.[8] He would like to limit the extraordinary powers which it sometimes assumed to really extraordinary cases;[9] and the criticisms

[1] See e.g. Hudson, op. cit. p. 123, cited vol. i 343 n. 7; ibid 51, cited vol. i 513.

[2] Above 161.

[3] Hudson, op. cit. 169, cited vol. i 500-501.

[4] "Therein sometimes there is a dangerous excess. For whereas the delinquent confesseth the offence *suo modo*, the same is strained against him to his great disadvantage. Sometimes many circumstances are pressed and urged to aggravate the matters which are not confessed by the delinquent; which surely ought not to be urged, but what he did freely confess in the same manner," Hudson, op. cit. 127-128.

[5] Ibid 8, 9; cf. Lambard, Archeion 116, 117, 216, 217; similarly, as we have seen (vol. iv 261 n. 6), Bodin praised the good and speedy justice which the king could do personally in his own Council; cf. Esmein, Essays in Legal History (1913) 206.

[6] Hudson, op. cit. 22—"Let this then suffice for the dignity of the court, that in the same, it matcheth with the highest that ever was in the world; in justice, it is, and hath been ever, free from the suspicion of injury and corruption; in the execution of justice, it is the true servant of the commonwealth, and whatsoever it takes in hand to reform, it bringeth to perfection. And therefore it is well called *Schola Reipublicæ*, the discipline whereof doth not only enter all other courts of justice and ministers thereof, but all the subjects of the kingdom."

[7] Ibid 49, cited vol. i 513-514.

[8] Below 185-187.

[9] Hudson, op. cit. 127-128—"This course of proceeding (the pressing of a confession against an accused person) is an exuberancy of prerogative, and therefore great reason to keep it within the circumference of its own orb"; "This great and sovereign arm is not to be stretched out in all cases, for that would destroy order and course, but must be rarely used, and in great and weighty causes," ibid 214, 215.

which he makes upon its procedure[1] were perhaps animated by a desire to check practices which were making it unpopular. The picture which he drew of the court is not quite an accurate picture of its later years. But it is not the least valuable of its features that it is drawn at the close of the period when men generally thought of the court as "one of the sagest and noblest institutions of the country,"[2] and at the beginning of the period in which they were beginning to regard it as a court which attempted to maintain royal absolutism, and to overthrow the constitution, by the cruelty of the punishments which it inflicted upon its political opponents.

Of the other treatises in which the court is described the most notable are those of Lambard and Crompton. Lambard devotes a large part of his Archeion to the court of Star Chamber.[3] Like Hudson he approaches it from point of view of the Tudor statesman. He defends its antiquity,[4] its wide jurisdiction,[5] and its necessity to the well-being of the state.[6] He gives us a little information about its procedure, and officials,[7] speaking more favourably of the procedure *ore tenus* than Hudson.[8] That the information which it contains is trustworthy is clear from the character of Lambard's other works, and from the fact that this part of his treatise probably owed a good deal to William Mills, the clerk of the court.[9] Naturally his treatment is directed more to the political than to the strictly legal aspect of the court. Crompton's chapter on the Star Chamber in his book on the Jurisdiction of Courts[10] approaches the subject from a point of

[1] Above 165. [2] Bacon, History of Henry VII.

[3] Archeion, or a commentary upon the High Courts of Justice in England 88-217; for this work see vol. iv 117-118; I have used the edition of 1635. There is also another short tract printed in Hearne's Curious Discourses ii 277-309 entitled "Camera Stellata, or an explanation of the most famous court of Star Chamber; together with an account of the offences there punishable; the fees payable, and the orders for proceedings therein"; Miss Scofield, in the App., pp. 81-82, to her book on the Star Chamber, gives some reason for thinking that, though stated in Hearne's print to be written by Mr. Tate, it was really written by Lambard, and was an early edition of the account in the Archeion; a MS. authority cited by her (Add. MSS. 4521 Art. 7) attributes the work to Lambard.

[4] Pp. 110-176, 194-205. [5] Pp. 102-109.

[6] Pp. 99-102, 138-143, 205-217. [7] Pp. 187-194.

[8] Pp. 211-213—"So if either the necessity of the cause doe require, that the guilty party bee speedily committed or charged, or if hee bee deprehended *in flagranti crimine* . . . or if the offence doe onely or chiefly concerne her Majesty, or if the circumstances thereof be such as may not seemly abide the blazing of a Bill, and then the offender shall, upon Examination, freely and without torture confess the body and substance of the crime that is verbally laid to his charge, surely neither he nor any for him can justly complaine of injustice in that he is sentenced without Bill and answere in writing."

[9] At p. 193-194 he speaks of him as "Mine ancient favourer," and a man "by whose good labours and friendships I was the better enabled to write some part of this present discourse."

[10] L'Authoritie et Jurisdiction des Courts (ed. 1592) ff. 29-41b; for this book see vol. iv 212.



view which is quite different from that of either Hudson or Lambard. It is the book of a common lawyer to whom details as to the procedure and the jurisdiction of the court are more interesting than large questions as to its position in the state, or its legal title to exercise jurisdiction. Having just glanced at and rejected the view that the court owed its origin to, and that its jurisdiction was limited by, the Act of 1487,[1] he at once plunges into a list of the statutes which affected it, and of the cases which showed the kind of matters which came before it. His work has none of the literary form which distinguishes Hudson's and Lambard's books. It is a useful collection of concrete facts and instances put together in somewhat haphazard fashion from statutes, abridgments, year books, law reports, books of entries, legal text books, chronicles, and his own experience.[2]

Of shorter accounts of the court I need only notice Smith's chapter in his book on the Republic of England,[3] and Coke's chapter in his fourth Institute.[4] Smith of course is concerned with the political aspect of the court, and it is interesting to note that, in his opinion, it gained the political position, which it occupied in his day, in the earlier part of Henry VIII.'s reign.[5] Coke's account is a useful summary of the history, powers, and political position of the court put together without any attempt at literary arrangement. It is important, both because it embodies a good deal of the experience which Coke acquired as attorney-general and as a judge of the court, and because it illustrates the attitude which a typical common lawyer could adopt to the court, before the constitutional controversies of the seventeenth century had convinced many of the common lawyers of the illegality of the powers which it was exercising.[6]

(2) The influence of the work of the Star Chamber on the development of English law.

Before the Star Chamber was abolished it had already begun to influence the development of the English criminal law, and certain of those branches of the law which lie on the border line between crime and tort. This influence was felt most strongly in the latter half of the seventeenth century, because the abolition of the court had made it necessary for the courts of common law to adopt a large number of the new rules of law which it had either originated or developed. Therefore a consideration of the

[1] ff. 29b, 30. [2] See ff. 32, 32b.

[3] Bk. iii c. 4. [4] Fourth Instit. c. 5.

[5] "This court began long before, but took great augmentation and authoritie at that time that Cardinall Wolsey, Archbishop of Yorke was Chauncellor of Englande. . . . Sith that time this court hath beene in more estimation and is continued to this day in manner as I have said before," Bk. iii c. 4.

[6] Fourth Instit. p. 65, cited vol. i 507-508.

way in which some of these rules grew up in the Star Chamber during this period is necessary, if we would understand the developments in the criminal law and the law of tort which, as we shall see, took place after the Restoration. In considering this subject I shall deal in the first place with the procedure of the Star Chamber, and in the second place with certain of the substantive rules of law which it enforced.

(i) *The Influence upon English Law of the Procedure of the Star Chamber.*

In many different countries in Europe it was upon the law of procedure that the influence of the civil and canon law had been most strongly felt. The old procedure of the Germanic tribes, who had overrun the Roman Empire, was too rigid in its forms to admit of the expansion rendered necessary by the growth of the modern state; and its oral character made it difficult for litigants to state accurately the issues of the more complicated cases which arose as civilization advanced.[1] It was marked by defects very similar to those which marked the *Legis Actio* procedure of the old jus civile; and just as the Prætor Urbanus and the legislature found a remedy in an adaptation to the uses of citizens of that formulary system which the Prætor Peregrinus had devised for aliens, so the courts and legislatures of the European nations found a remedy in the adaptation of the new written procedure which the civilians and canonists were creating on the basis of the procedure in force in the latest period of the Roman Empire. Thoughout the Middle Ages this process had been going on. In many countries and in many different ways and degrees the influence of this new procedure had made itself felt. In England it can, as we have seen, be traced in Glanvil and Bracton's books;[2] and at a later period it was the model upon which the procedure of the court of Admiralty was formed.[3] Abroad it had a more marked and permanent influence, which tended to increase with the increase of the influence of the rules and conceptions of the Roman law. And in this branch of the law, the influence of the canon law was felt as strongly, if not more strongly, than the influence of the civil law. In many cases the system of procedure devised by the civil lawyers was found to be too lengthy and too cumbrous. We have seen that the canon law had helped forward the growth of a more convenient and a more speedy procedure in commercial cases.[4] We shall now see that it helped forward similar changes in the law of criminal procedure, in most of the states of continental Europe.

[1] Vol. i 301; vol. ii 105-106, 116-117. [2] Ibid 203, 228, 251; vol. iii 630-631.
[3] Above 126. [4] Above 81-83.



In England the influence of the canonists can be traced in the procedure adopted in civil cases by the court of Chancery and the court of Requests, and in criminal or quasi-criminal cases by the court of Star Chamber. But, while abroad, the older criminal procedure was wholly superseded by the new, in England a reformed edition of the older procedure held its ground. In the law of criminal procedure, as in other branches of the law, the judges of the king's court in the twelfth and thirteenth centuries, had applied their knowledge of the civil and canon law to the work of rationalizing and adapting old institutions and old rules to the new needs of their own time. They had thus devised a system of presentment by grand jury, written indictment, and trial by petty jury which combined the old idea that the individual and the community should take some share in initiating proceedings, with the new idea that the king as representing the state is immediately concerned with suppressing those serious crimes which break his peace; which combined also the new idea that the charge should be precisely formulated in writing, with the old idea that the trial should be public and the procedure oral.[1] And when, in the course of the fourteenth and fifteenth centuries, Englishmen began to contrast their own system with that which was growing up elsewhere under the influence of the canon law, they began with some reason to regard it as the most valuable of all the privileges which the common law had conferred upon them.[2] It was the system which the Parliaments of the fourteenth and fifteenth centuries proclaimed to be the only constitutional method of criminal procedure, when they protested against those newer methods which the Council and the Chancery were borrowing from the canon law.[3] It was the system which in 1536 they substituted for criminal procedure of the civil law which was used in the court of Admiralty.[4]

A system so deeply rooted in the affections of the people could not be very much modified, far less abolished, even by the strongest of the Tudor sovereigns. But the lawlessness of the fifteenth century[5] showed that it needed to be improved, controlled, and supplemented. This process was carried out mainly by means of adding to the older procedure certain of the ideas which were current in those new and effective codes of procedure with which the modern European states were arming

[1] Vol. iii 611-623.
[2] Fortescue, De Laudibus c. 22. 27-30; there is no doubt that Fortescue voiced the general opinion when he contrasted the humanity of the English with the cruelty of the continental system, see the passage from c. 27 cited vol. iii 622.
[3] Vol. i 487.
[4] 28 Henry VIII. c. 15; vol. i 550-551; vol. iv 260.
[5] Vol. ii 414-415; vol. iii 623.

themselves; and these additions came to a large extent through the Star Chamber. At the same time the strength of the nation's feeling that its rights and liberties were bound up with the maintenance of the criminal procedure of the common law, caused these additions to be very considerably modified in the course of their adaptation to English needs. I have already pointed out that in the sixteenth and seventeenth centuries, as in the twelfth and thirteenth centuries, the reception of foreign ideas did not lead to the introduction of a foreign system of law, but to the strengthening and improvement and enlargement of our own native system;[1] and this fact is, as we shall now see, nowhere so strikingly illustrated as in the law of criminal procedure. But to understand the effect which the English and the continental ideas had upon one another, I must begin by describing briefly the differences between the continental and the English system of criminal procedure at this period. I shall then describe the procedure of the Star Chamber; and show how, as compared with the continental system, it was modified by the ideas underlying the system of the common law, and, conversely, how the continental ideas, which came through the Star Chamber, modified the common law.

(*a*) *The differences between the continental and the English system of criminal procedure.*[2]

In describing the continental criminal procedure we can take the French development as typical. Esmein has said,[3] "Nowhere had the forms become better settled, or the rules more clearly and firmly established. . . . But, at the same time, nowhere had the severities of the system been more rigorously enforced, or the defence more rigidly hampered. For good as for ill, the system had been carried to extremes. One exception must be made, however, in regard to torture; this was resorted to by Italy and Germany especially with a harshness exceeding that practised in France. One institution in particular, that of the public prosecutor, distinguished France from the neighbouring nations. Not that it was not also found abroad, but it had either been introduced by French influence, or it was imperfect and did not form, as in France, an essential part of the machinery of the procedure."

As early as the ninth century the church had allowed notorious crimes to be prosecuted without the necessity of an

[1] Vol. iv 285-286, 292-293.

[2] In dealing with this subject I have relied upon Esmein's history of Continental criminal procedure translated by J. Simpson for the Continental Legal History Series; and the references are to the pages of this edition.

[3] Op. cit. 288.



accuser.[1] But it was difficult to establish notoriety, and no person had an official right to prosecute.[2] The latter defect was remedied by papal legislation of the late twelfth and early thirteenth centuries.[3] The judge was allowed, on proof of ill fame, to prosecute officially the suspected person; and he could proceed *per inquisitionem*. The person thus prosecuted could be compelled to answer on oath the questions of the judge;[4] and this "inquisition" was from that time onwards a central feature of the canonical procedure, and of the criminal procedure developed from it. Once this procedure had been established it made rapid way. The injured person naturally preferred it, both because it was very much more effective, and because the bringing of an unsuccessful charge did not, according to the canon law, involve the prosecutor in the penalties which would have been inflicted on the accused if the charge had been proved.[5] Technically he was not the accuser: he merely denounced the accused to the judge and so set in motion the inquisitorial procedure. The spread of this method of prosecution soon gave rise to another development—the rise of officials specially charged with the duty of denouncing offences to the judge, and of thus setting in motion the inquisitorial procedure;[6] and its efficacy was increased by the fact that in the thirteenth century torture was allowed to extort evidence.[7] At first a considerable liberty of defence was allowed.[8] But this liberty was gradually restricted, more especially in cases of heresy;[9] and these restrictions were not only imitated

[1] Esmein, op. cit. 79-80.

[2] Ibid 80.

[3] Ibid—"It was introduced by the decretals of Pope Innocent III. The first to come under notice is of date 1198. Then a series is found in rapid succession, in 1199, 1206, 1212. At last, in 1215, the fourth Lateran Council solemnly confirms the principle."

[4] Ibid 82; to get round the rule that no one was bound to incriminate nimself, it was said that, though under the compurgation system the infamatus must have not only his own oath but also that of the compurgators to clear him, under the inquisition system only his own oath was required; as Esmein says, this was a sophism; the compurgation and the compulsion to answer dextrous interrogatories were very different things; for the history of the rule against self-incrimination see below 182, 193-194, 333; vol. ix 198-201.

[5] Ibid 86-87.

[6] Ibid 87-88.

[7] Ibid 91-92—"The Canon law had permitted it by virtue of the predominating influence of the Roman law. No trace of it is to be found in the procedure of the ecclesiastical courts of the Frankish monarchy, and the Decretum of Gratian . . . repudiates torture . . . the instrumentality by which the influence of the Roman law in this direction was augmented and sanctioned is to be found in certain passages borrowed from the ancient ecclesiastical Fathers who lived in the days of the Roman Empire, and who spoke of the torture which they saw in practice every day in a civilized country as if it were a normal and natural thing. . . . The great doctors of the thirteenth century, including Innocent IV. and Durantis, entertained no doubts as to the legality of this method of examination."

[8] Ibid 90-91—thus the accused got the depositions of the witnesses against him; he could produce objections to their admissibility, and could reply to their testimony; he could freely plead any defence he had, and prove it by witnesses; he could have the help of counsel.

[9] Ibid 92-93.

but even made more severe when the procedure *per inquisitionem* was adopted by the state, and made the regular procedure in criminal cases.

In the secular law this procedure *per inquisitionem* could at first only be used if the accused consented.[1] This was a similar rule to that which required the consent of the accused to a trial by petty jury; and, as in our law, the consent was often compelled by duress.[2] But there was one exception to the rule which required the consent of the accused. The procedure could be used without the consent of the accused if he was caught red handed; and it came to be thought that, if the guilt of the accused was so obvious that many witnesses were prepared to swear to it, it could also be applied, because the notoriety was equivalent to capture in the act.[3] The judge, being thus "apprised" of the facts, could proceed by inquest—hence the name for this form of prosecution was the "aprise."[4] This development was helped by the existence of the king's right to find out facts which affected his rights by inquest.[5] The repression of crime had come, by the thirteenth century, to be regarded as a matter in which the king was chiefly interested. Therefore it was thought that he might apply this inquest procedure to all cases;[6] and it was not long before the two forms of procedure—the "aprise" and the inquest—became merged.[7] The inquest thus developed into a body of witnesses who, in accordance with the ideas of the canon law, could be questioned secretly and apart, and not, as in England, into a body of jurors.[8] And, in accordance with these same ideas, the accused could be questioned on oath.[9] The other developments which had occurred in the canon law soon made their appearance. The private accuser could make use of it by denouncing the accused to the judge;[10] and soon a set of public prosecutors arose in the procurators of the king and the great nobles.[11]

It was not long before the canonical methods of taking evidence made their appearance. The witnesses were summoned by the court, and were questioned by the delegate of the judge in private. The delegate reduced the depositions to writing, and they formed the chief material upon which the parties and the judge proceeded at the hearing. With these canonical methods and rules as to

[1] Esmein, op. cit. 94. [2] Ibid; vol. i 327.
[3] Esmein, op. cit. 94-95. [4] Ibid. [5] Ibid 97; vol. i 312.
[6] Esmein, op. cit. 98. [7] Ibid 99.
[8] Ibid 106; cp. vol. i 303-304, 315-319.
[9] Esmein, op. cit. 95-96, 120. [10] Ibid 99-100.
[11] Ibid 114-118—they appear at first not as direct parties, but as promoting the office of judge, as denunciators who set the judge in motion.



evidence came the use of torture. It may be that in certain exceptional cases some Germanic customs allowed torture;[1] but it is clear that the rapid growth of this method of examination was due to the rules of Roman law which were adopted by both canonists and civilians; for, as the new methods of trial were more complicated, they tended to increase the influence of the professional lawyers.[2] "Our jurists," says Esmein, "found in the pages of the Digest and the Code the custom of torture expounded by the great jurisconsults and regulated by the constitutions of the emperors. Such weighty authority was without doubt bound to cause partial forgetfulness of the odious nature of this mode of examination."[3] The king in that turbulent age found it necessary to use it to repress crime, and other jurisdictions soon followed suit. Moreover it satisfied two technical needs. In the first place the "aprise" could not proceed without very conclusive evidence or confession; and so it was tempting, if a prisoner refused the inquest, to try to force a confession by torture. If he accepted the inquest torture was never at this period resorted to.[4] In the second place the civil and canon law required, in the absence of confession, such complete proof that the temptation to get a confession was increased. "The connection," says Esmein, "between the rigorousness of the proofs and the use of torture is destined to form a vicious circle within which our old criminal procedure will revolve throughout its whole future existence."[5]

This new system of criminal procedure was not established without protest. At first a man convicted by the aprise could not be punished so severely as if he had been convicted by the accusation of a private person.[6] The nobility protested against the procedure by inquest in matters which affected their persons, property, or honour;[7] and, for a time, the nobility succeeded in making good their claims.[8] But gradually the newer ideas prevailed and the procedure was made to press, not less, but more heavily upon the accused.

The introduction of the new system was helped by the fact that, in the fourteenth and fifteenth centuries, a distinction between "ordinary" and "extraordinary" procedure was established. In the latter form of procedure torture was allowed, secrecy became one of its dominant characteristics, and freedom of defence was more and more curtailed.[9] This extraordinary procedure was,

[1] Esmein, op. cit. 108-111. [2] Ibid 106.
[3] Ibid 112. [4] Ibid 113. [5] Ibid 113.
[6] Ibid 95—"For a fairly long time the sufficiency of the 'aprise' to sustain the ordinary and normal punishment of the offence was denied"; and at an earlier period the same rule held in the case of one convicted upon an inquisitio in the ecclesiastical courts, ibid 82.
[7] Ibid 102. [8] Ibid 103-104. [9] Ibid 126.

as Esmein says, destined to be "the procedure of the future."[1] At first indeed it was not the normal procedure—it was really extraordinary. It could not be employed when a private person was the accuser,[2] or when the accused submitted to the inquest.[3] But gradually these rules disappeared. It came to be used in all cases of serious crime, and the ordinary procedure by inquest fell into disuse.[4] For some time, however, the accused was allowed considerable freedom in his defence. "Before sentence he could plead his cause or have it pleaded for him; and he could also allege facts in justification and prove them by witnesses."[5] Moreover the court facilitated the proof by the accused of any facts—an alibi for instance—which he might set up in his defence.[6] But gradually these safeguards disappeared. Under the Ordinances of 1498 and 1539 the characteristics of secrecy, torture, and restricted opportunities of defence, became the salient features of the procedure.

The ordinary course of procedure under these Ordinances was as follows:—

First there was the information verified by the evidence of witnesses. This was submitted to the judge and communicated by him to the king's procurator.[7] On his advice the judge either let the matter drop or summoned the party accused.[8] In any serious case the accused was arrested and kept in prison during the whole of the subsequent proceedings,[9] and was denied the assistance of counsel.[10] The accused was then interrogated by the judge "immediately, carefully and assiduously," and his replies were reduced to writing.[11] Unless the parties wished to get a decision as to the legal effect of the facts elicited by the interrogation, the next step was for the judge to decide whether to hear the case as an ordinary or an extraordinary action; and on this matter the Ordinance forbade the accused to be heard.[12] Generally the judge decided to hear the case by way of extraordinary action.[13] The witnesses were then summoned anew to confirm the evidence which they had given on the information. Each witness was then confronted with the accused, who, then or not at all, must raise any objections he had to the competency of the witness.[14]

Up to this point the accused had had no opportunity of proving his innocence; and both the theory of evidence and the practice

[1] Esmein, op. cit. 126. [2] Ibid. [3] Ibid 127.
[4] Ibid 132, 133. [5] Ibid 131. [6] Ibid 141.
[7] Ibid 150. [8] Ibid. [9] Ibid 151, 160.
[10] Ibid 151; art. 162, cited ibid 159, says—"In criminal matters the parties shall in nowise be heard by counsel or agency of any third person; but they shall answer by their own word of mouth for the crimes of which they are accused."
[11] Ibid 151, 152. [12] Ibid 152-153. [13] Ibid 153. [14] Ibid 153-154.



of the court made it difficult for him to do so. According to the canonical theory of evidence there was no need to bring witnesses to prove absence of guilt, as it was for the prosecution to establish the fact of guilt by bringing the proof required by the law. If they brought these proofs, he was guilty; if they could not bring them, he was not guilty. All the accused could do was to adduce evidence of new positive facts inconsistent with guilt, e.g. an alibi, or the fact that a person supposed to be murdered was alive, or insanity, or self-defence. These facts must be pleaded by the accused when he was first interrogated, and he must get the leave of the judge to prove them.[1]

The whole process was then submitted to the king's procurator. If the accused had pleaded no new facts inconsistent with his guilt the court was moved to make a decree for torture or final sentence.[2] If he had pleaded such facts motion was made that he prove them; and then, if the judge allowed such proof, the witnesses were examined by the court in the absence of the accused, and their depositions were put into writing.[3] The whole record was then submitted to the court.[4] If the proof was not conclusive, but nearly conclusive, the court could order torture (*question préparatoire*) to extort a confession.[5] If it was conclusive the court proceeded to sentence;[6] and after sentence the condemned person could be tortured (*question préalable*) in order to extract the names of his accomplices.[7] Even the sentence of the court was not publicly pronounced.[8]

A few protests against this system were made; but they found no echo in public opinion.[9] "It is not so easy," says Esmein, "to understand the unopposed acceptance of this

[1] Esmein, op. cit. 155-156—"If the fact was not 'legally' proved by the witnesses brought by the prosecution, any proof on the part of the accused was said to be useless. If, on the contrary, the action should establish, by the requisite proofs, that the crime had actually been committed and that the accused was the perpetrator of it, he could only rebut the testimony by means of the objections which he had urged, or prove that these witnesses were suborned, or, finally, offer certain positive facts, which formed his justification. These facts—called 'justificatifs'—were of two kinds; some proved the innocence of the accused indirectly, but beyond dispute. Such were the alibi. . . . Others, without rebutting the facts established in the action, deprived the act of all criminality; for example, legitimate self-defence, or insanity. . . . Objections to the witnesses and justificative facts, therefore, were the only defences left to the accused;" for similar and even more restrictive rules in Scotland, see Stephen, H.C.L. i 351-353—it appears that even proof of an alibi was not admitted.
[2] Esmein, op. cit. 156. [3] Ibid 156-157.
[4] Ibid 157—to enable the court to understand it, it was accompanied by a report made by a judge; similarly in Select Pleas in the Star Chamber (S.S.) i 191, 192 we get the points of a case summarized; and see Nicholas vii 287 (1541), for a case where the depositions were abridged by the examiner.
[5] Ibid 157-158. [6] Ibid 158-159.
[7] Esmein, Histoire du droit Français 779.
[8] History of Continental Criminal Procedure 159, 160.
[9] Ibid 165-173.

procedure by the nation."[1] The Ordinances which increased the severity of the procedure were, as he points out, passed at a time when States-General were still summoned, when therefore the voice of the nation could have made itself heard. He thinks that we must find the reason for the popular acquiescence in this procedure in the fact that, "the people, emerging from the anarchy of the Middle Ages and from the great wars against the English . . . felt above all else the need of security and peace. The new Ordinances furnished a better assurance than any other law for the repression of crime."[2] We shall do well to remember this acquiescence of the French nation when we come to consider the reasons for the undoubted popularity of the Star Chamber in the sixteenth century.[3] It will help us to understand both why it was popular, and why it was able to borrow some of the features of this continental procedure. But we must first indicate a few of the most salient differences in the English procedure which had been developing contemporaneously with the French procedure which has just been described. Both these very different systems influenced the procedure of the Star Chamber; and, through the procedure of the Star Chamber, some of the continental ideas were introduced into the common law.

With the mediæval history of the criminal procedure of the common law I have already dealt.[4] We have seen that in the course of the thirteenth and fourteenth centuries the indictment had practically superseded the appeal;[5] and that this meant that a true criminal procedure had emerged. But we have seen that this procedure by way of indictment had inherited one important characteristic from the procedure by way of appeal. It was accusatory, not inquisitorial. That meant that the procedure was regarded as a piece of litigation between the crown and the accused, to be tried by judicial processes analogous to those used in an ordinary action; and not as an inquiry into the guilt or innocence of a suspected person conducted by officials. Hence similar rules of procedure and pleading, and the same public trial by jury, were applied to the trial of a suspected person, as were applied to the trial of an ordinary action. The survival of these ideas had prevented the growth of that secrecy, and those restrictions on the accused's powers of defence, which the abandonment of these ideas had brought into foreign systems of law.[6]

Then as now the official mind cared more for the working of the system which it had established, and for the production of

[1] History of Continental Criminal Procedure 165.
[2] Esmein, op. cit. 166.
[3] It may be noted that in 1614 a bill was before Parliament which proposed to punish by a death by torture any attempt upon the king's life, Hist. MSS. Com. 3rd Rep. 13.
[4] Vol. iii 597-623. [5] Vol. ii 360-364; vol. iii 608-609. [6] Ibid 620-622.



the results which it thought that it ought to produce, than for any consideration of justice to the particular individual. Then as now the procedure of judicial courts designed to do justice to individuals produced results disconcerting to the official mind. Fortunately for England the most essential rights of Englishmen were in the Middle Ages and, to a large extent, in this period, asserted in and applied by judicial courts which acted under judicial forms. I have already indicated the beneficial results produced by this phenomenon in the sphere of government central and local:[1] in the sphere of criminal procedure the beneficence of these results is no less striking. In the sphere of government they made the law supreme: in the sphere of criminal procedure they gave to an accused person the benefit of the rules which the court applied in judicial proceedings to ascertain the truth. Criminal procedure, like the system of local government, had been rationalized by the strong kings of the twelfth and thirteenth centuries, and by the statesmen and lawyers of the fourteenth and fifteenth centuries. The result was that in both cases the mediæval systems were so strengthened that they were able to stand their ground in the sixteenth century.

In England, therefore, there was no need to introduce the inquisitorial procedure of the canon law. In the course of the fourteenth and fifteenth centuries the humanity of the English system began to stand out in striking contrast to the continental system; and the records of Parliament show that Englishmen appreciated its advantages at their true value.[2] A system which had come to be completely identified with the maintenance of liberty and the common law could not be rooted out. As we have seen, any other system was regarded with dislike and suspicion. But there was no doubt that in the sixteenth century it badly needed reforms, if it was to do its work amidst changed social conditions. That juries were easily corrupted and intimidated was only too evident. They were ceasing to be able to give a verdict from their own knowledge, and as yet there was no law of evidence to guide them in weighing the testimony of the witnesses which gave evidence before them. We have seen that the legislature recognized that the machinery of the grand jury by itself was unequal to the task of discovering and presenting all the criminals that should be brought to justice;[3] and that it had provided for a preliminary inquiry before justices of the peace, who, after such inquiry, could commit the accused to prison till he could be presented by the grand jury and tried.[4]

[1] Vol. iv 136, 164-166, 181, 188. [2] Above 169.
[3] Vol. iv 138, 140, 524; the preamble to the Act of 1487, Pro Camera Stellata, shows this, vol. i 493.
[4] Vol. i 295-297; vol. iv 528-530; below 191.

In other directions, however, the legislature did very little to reform the shortcomings of the mediæval criminal procedure.[1] Any reforms must have taken the form of arming the government with fresh powers against the criminal; and it would have been difficult to induce Parliament to agree to a set of changes which would have aroused popular apprehension. But an opportunity was afforded to the courts to make some changes by the lack of precise rules as to the conduct of prosecutions. The legislature had prescribed a preliminary examination; but it had not stated precisely how it was to be conducted. No definite rules existed as to the mode in which evidence should be taken, or as to the mode in which the jury might arrive at its verdicts. It was not even certain whether the prisoner could call evidence for the defence. The king, by virue of his prerogative, had certain privileges, not always very clearly defined, in the conduct of cases to which he was a party. It is clear that such uncertainties as these gave an opportunity for innovation. It was impossible to transplant the inquisitorial procedure of continental codes; but it was possible to take some hints from the procedure of the Star Chamber, which had to a certain extent been influenced by the continental ideas. To understand the nature of this influence we must look at the salient features of that procedure.

(*b*) *The Procedure of the Star Chamber.*

In outline the ordinary procedure of the court of Star Chamber in the sixteenth century was very similar to that used by the court of Chancery. Council and Chancery had, as we have seen, worked together in the mediæval period.[2] Therefore their procedure in the Middle Ages was in substance identical. I shall describe the mediæval procedure of the Chancery when tracing the earlier history of equity.[3] It will therefore be sufficient if at this point I describe the procedure of the Star Chamber as it existed during this period.

The proceedings before the Star Chamber began by a Bill "engrossed in parchment and filed with the clerk of the court." It must, like the other pleadings, be signed by counsel; and the counsel in Lord Keeper Bacon's time, must have attained the rank of double reader or be one of the king's counsel.[5] But, when Hudson wrote, the requirement of status was not insisted on.[6]

[1] Vol. iv 531-532. [2] Vol. i 399-404.

[3] Below 284-287; see generally on this topic Baldwin, The King's Council, 280-304; Select Cases before the Council (S.S.) xxxv-xlv.

[4] Hudson, op. cit. 150; for some early specimens see Select Cases in the Star Chamber (S.S.) i 1, 6, 15, 54.

[5] Hudson, op. cit. 151; at this period the formation of the definite order of King's Counsel was only in its initial stages, see vol. vi c. 8.

[6] Ibid; cp. Les Reportes del Cases 32.



However, counsel were obliged to be careful what they signed. If they put their hands to merely frivolous pleas, or otherwise misbehaved themselves in the conduct of their cases, they were liable to rebuke,[1] suspension,[2] a fine,[3] or imprisonment.[4] The Bill must state the matters charged certainly[5] and truly.[6] There must be certainty both as to the place and as to the time of the matters alleged.[7] Though the court did not show the same strictness in its requirements as to the form of a Bill as the courts of common law showed in their requirements as to the form of an indictment,[8] yet an offence must be shown on the face of it. Thus "in the earl of Northumberland's Case against Burr for forging and publishing a deed, the publication of the forged deed was proved against the defendant; yet because he was not charged to have published it knowing it to be forged, which makes the offence in the publisher and is the apt legal charge, the defendant was dismissed."[9] The conclusion of the bill must pray process against all the defendants, and must name them by their right names.[10] Unless these rules were complied with a motion to dismiss the Bill would succeed; and the plaintiff would be obliged to start again.[11]

The defendant then appeared, and retained his attorney, who took a copy of the Bill in order to prepare the defence.[12] The defence, Hudson tells us, should always be drawn by counsel.[13] It could take the form of a plea, a demurrer, or an answer. The possible pleas were very similar to those admitted in the common law courts, e.g. there might be a plea to the jurisdiction of the court; or the disability of the plaintiff, or the fact that the matter had been determined or was under consideration by another court might be set up.[14] Similarly, as at common law, there

[1] In Les Reportes del Cases 43, the Lord Keeper said to counsel, "You must goe to schoole to learne more wytte, you are not well advysed, you forgette your place, and to be plaine it is a lye"; cp. ibid 127, 128; Stephen, H.C.L. i 341.

[2] Les Reportes del Cases 32—a barrister disbarred for seven years for putting his hand to a scandalous bill.

[3] Ibid 82—counsel fined and disbarred from all further practice in the court.

[4] Hudson op. cit. 162. [5] Ibid 154. [6] Ibid 153.

[7] Ibid 154, 155; cp. Les Reportes del Cases 61.

[8] Hudson, op. cit. 156; for the common law rules see vol. iii 617-619.

[9] Hudson, op. cit. 156. [10] Ibid 157.

[11] Ibid 156. There were various orders made against too great prolixity in the bill, see vol. i 500-501.

[12] Hudson, op. cit. 157-160; at p. 158 Hudson says—"In former times this appearance was always taken before some lords, and either in court of council chamber, or in the lord keeper's house; and of latter times before the clerk of the court, who went sometimes (very rarely) to take the appearance of the defendant; for which he hath ever had the fee of ten shillings; the gaining whereof hath caused the under clerk to attend all persons of any eminence, to take their appearance at their house or lodging; which is a great derogation to the dignity of this court."

[13] Ibid 160. [14] Ibid 162-164.

might be demurrers for insufficiency in the form of the Bill,[1] or in the matter of the Bill. "Insufficiency of matter is alleged, sometimes, that the matter in charge tendeth to accuse the defendant of some crime which may be capital; in which case *nemo tenetur prodere seipsum;* or upon a penal law, where he is to forfeit his goods: sometimes, that the matter is proper for ecclesiastical cognizance, as defamation or such like: sometimes, that it is petty or trivial, and so not worthy the dignity of the court."[2] Proof of a plea or demurrer meant that the bill was dismissed with costs.[3] If it was not proved the defendant was ordered to make a better answer.[4] The answer must either confess the charge made by the Bill, or deny it, or justify by reason of some title or provocation.[5] It "must be engrossed in parchment and subscribed by counsel, and so brought to the clerk of the court, who is to give the defendant his oath; which is, that so much of the answer as containeth his own act and deed, he knoweth to be true; and so much as containeth another man's, he supposeth to be true; and he sweareth likewise, that he shall make true answers to such interrogatories as shall be ministered unto him concerning that cause."[6] The answer was then delivered to the plaintiff's attorney to be copied for him.[7]

Upon the answer the plaintiff drew up interrogatories which the defendant must answer.[8] It would seem from Hudson's account that, in spite of the efforts of Bacon and Egerton, the power to administer these interrogatories was much abused.[9] The defendant was examined privately, and must reply without the help of counsel.[10] Moreover Egerton advised those who took these examinations not to allow either the defendant or the witness the help of writing to refresh their memories.[11] Speaking

[1] Hudson, op. cit. 164-165; Les Reportes del Cases 91; apparently the time of the court was sometimes wasted by frivolous demurrers, ibid 143.

[2] Hudson, op. cit. 164; for the history of the maxim "nemo tenetur, etc.," see vol. ix 198-201; but it was not applied when the procedure was extraordinary, below 184-187.

[3] Ibid 165.

[4] Ibid 165-166.

[5] Ibid 166; for a specimen of an answer see Select Cases in the Star Chamber (S.S.) i 47, 48.

[6] Hudson, op. cit. 167; Hudson explains, ibid 167-168, that all, even the lords of Parliament must answer on oath, though they had attempted to set up a special privilege against this; "but if any person shall refuse to answer, being imprisoned, he shall have day given him, and be close imprisoned; and if that will not prevail, he shall, by another day, have the bill taken *pro confesso;* or sometimes he is kept with bread and water, as young *Booth* was."

[7] Ibid 167.

[8] In Reportes del Cases 72 the court held that the refusal of a defendant to answer was equivalent to a confession; cp. ibid 74, 90.

[9] Ibid 169, 170; vol. i 500-501; Les Reportes del Cases 54, 55—a case in which there were 155 interrogatories on one side and 125 on the other.

[10] Hudson, op. cit. 170.

[11] Reportes del Cases 222—"A wyse commissioner will hear a wytnes *viva voce* and admitte noe wrytinge."



of the manner of taking the examination Hudson says,[1] "Neither may he or his counsel have any sight of the interrogatories to give him any directions, but the examiner readeth an interrogatory, and requireth an answer to the same, and then readeth another; by reason whereof if he affirm a falsehood at first he is taken in an error, whereby he is compelled to reform his error; and this examination may be in any part amended by him before he putteth his hand thereto, whereby he doth acknowledge it to be that by which he will abide." These examinations were usually conducted by four commissioners who, in Hudson's day, were often chosen by the parties.[2] In earlier days, and probably in cases of cases of public importance in Hudson's day, they were selected by the court.[3] The examinations, when complete, were engrossed and returned to the court under the seal of the examiners, together with any documents (called "exhibits") which had been put in evidence.[4]

We have seen that in earlier days the methods of procedure in the Chancery were not so markedly different from the procedure in the common law courts as they afterwards became.[5] It was the same with the procedure of the court of Star Chamber.[6] After the answer, there were sometimes further pleadings till the parties came to an issue as at common law. Thus we find replications by the plaintiff, and rejoinders by the defendant; "and the pleadings have, in ancient times, proceeded to the surrejoinder and rebutter."[7] But it is clear that when Hudson wrote the joinder of issue, and the later pleadings leading up to the joinder of issue, had become, as they became in the court of Chancery,[8] mere matters of form.[9] The next important step was the examination of the witnesses.[10]

The examination of the witnesses took place either in court

[1] Hudson, op. cit. 170-171. [2] Ibid 182-183. [3] Ibid 181.

[4] Ibid 186; for some specimens of these interrogatories see Select Pleas in the Star Chamber (S.S.) i 89, 177; for some specimens of the examinations taken see ibid 117, 270, 271.

[5] Vol. i 450-451; cp. Select Cases in the Chancery i 26, 52, 53, 89.

[6] Hudson, op. cit. 189-192; Select Cases in the Star Chamber (S.S.) i 66, 67, 78, 79, 117, 232, 234.

[7] Hudson, op. cit. 191. [8] Vol. ix 378, 392-393, 404-406.

[9] "The replication itself is but the avoidance or denial of the answer and maintenance of the bill, to draw the matter to direct issue, which may be proved or disproved by testimony; but if anything be omitted out of the bill material to charge the defendant, although it be alleged by way of replication, it is not pertinent nor shall any defendant be convicted thereupon; by reason whereof there is so little regard of the replication, as that they are only drawn by clerks, without any regard whether there be any issue joined in the case or not, no counsel being made privy or acquainted therewith; insomuch as if many causes were well looked into when they come to hearing, the parties would be found not to have joined any issue," Hudson, op. cit. 191.

[10] For some specimens of these examinations see Select Cases in the Star Chamber (S.S.) i 68, 69, 80-88, 184-187, 193-198.

by an examiner specially appointed, or by commissioners in the country.[1] Like the commissioners appointed for the examination of the defendant, they could be appointed by the court or chosen by the parties.[2] They examined each witness apart from the others and in private.[3] All witnesses must be sworn, even peers of the realm.[4] Each witness must be produced before the attorney of the other side that he might be identified, and that the attorney might be able to get him examined on his own behalf.[5] The court of Star Chamber did not discourage volunteer witnesses: it welcomed and protected them. The other party could not examine in order to discredit them, because if this were allowed it would discourage them from coming forward to testify.[6] Any exceptions to the witnesses must be moved in open court.[7] Probably for a similar reason they could not be compelled to incriminate themselves, or to answer any question scandalous to themselves.[8] As a rule a person could not be compelled to testify;[9] but it is clear that on grounds of public policy the court would compel them to testify by committing them to prison if they refused.[10]

Already some of the defects of this method of examination were beginning to appear. Though the witnesses could be examined upon as many interrogatories as the party wished if the examination took place in court,[11] this could not be done if the examination took place before commissioners in the country. Only the interrogatories settled upon before the commission issued could be administered without a special order of the court.[12]

[1] Hudson, op. cit. 199. [2] Ibid 202. [3] Ibid 204.

[4] Ibid 207—Hudson says that the peers claimed to give evidence on their honour, but that "the present current is against it"; in Les Reportes del Cases 222 Egerton clearly pronounced against it, "Not sworne bindes no man."

[5] Hudson, op. cit. 200.

[6] Ibid 200-201—"But it is . . . wondered that this court suffereth not the parties to examine the credit of witnesses. . . . And the reason why . . . is, for that causes being for the king, if witnesses lives should be so ripped up, no man would willingly be produced to testify; and therefore many opinions . . . of judges are extant in this court, where it is adjudged that a witness deposing for the king upon an indictment shall not be questioned for perjury; yea this court hath ordered a great reward to witnesses . . . yielding their testimonies for the king"; but the rule that the king's witness could not be indicted for perjury was denied by Coke in the Star Chamber, Les Reportes del Cases 108.

[7] Hudson, op. cit. 201. [8] Ibid 208-209.

[9] Ibid 209. [10] Ibid. [11] Ibid 200.

[12] "Egerton understanding that when commissions were in execution, both parties attended with their counsel, and when they suspected a proof made against them . . . they always drew new interrogatories to cross that proof, which he conceived to occasion much perjury; he therefore made an order, that in all commissions which went forth for the examination of witnesses, they should include all their interrogatories, and the commission should go to examine *super interrogatis inclusis*, and not *ministrandis*. Nay, if commissions be in part executed, they cannot add to or alter any of those interrogatories . . . except it be by the special order of the lord keeper or the court," ibid 202.



The court did not see the witnesses, and therefore it was not easy to form a conclusion as to their credibility.[1] The commissioners could not adjudicate upon the question whether a witness was incompetent.[2] This must be reserved to the court, which settled the point at the hearing;[3] so that in case an exception to a witness was upheld by the court the time and labour of the commissioners were thrown away. Hudson was by no means blind to these deficiencies of the established practice of the Star Chamber in the taking of evidence. But it is clear from his account that many of them arose very largely from the fact that the law of evidence was as yet in an experimental stage. The common law courts were only very gradually feeling their way to the establishment of a law of evidence.[4] Therefore neither the Star Chamber nor the Chancery could expect to find much guidance in the common law. On the other hand the long treatises of the civilians were so copious that they puzzled judges and practitioners whose knowledge of the civil law was slight.[5] It became necessary, therefore, for these courts to make their own rules; and we shall see that some of these rules have had a considerable influence upon the making of our present law.[6] Here it will be sufficient to give one instance. The earliest statement of the rule that a declaration by a dying man as to the cause of his death is admissible evidence in a trial for murder or manslaughter is to be found in a dictum of Coke in the Star Chamber.[7]

The next stage of the case was the publication of the answers of the defendant and the witnesses. After publication no more witnesses could be sworn except for very special reasons.[8] One of these reasons might be a desire of the court to hear more evidence. It was then said to be taken *ad informandum conscientiam judicis*,[9] as in the continental practice. Then was the time to bring forward any objection to the evidence taken or

[1] "It is a great imputation to our English courts, that witnesses are privately produced, and how base or simple so ever they be . . . yet they make as good a sound, being read out of paper, as the last," Hudson, op. cit. 200.

[2] Ibid 203—unless it appeared that the witness was a party to the suit or an idiot.

[3] Ibid 215. [4] Vol. ix 181-185.

[5] Hudson after stating some rules as to the competency of witnesses, as to the method of getting them before the court, and as to the mode of examination, says that he has spent more time upon this subject, "for that the books of common law do yield small direction for examination of witnesses, and the civilians are therein far too copious."

[6] Vol. ix 187-197, 203-219.

[7] Les Reportes del Cases 318—"If a man be robbed or wounded and he writes down a perfect description of the men whereby they are known and so dies, this will be good evidence to convict them"; Stephen, H.C.L. i 447, 448 thought that the rule was only about 100 years old.

[8] Hudson, op. cit. 210-211.

[9] Ibid 211; Reportes del Cases 206, 211; vol. iv 278 n. 2.

as to the conduct of the examination.[1] After publication, the plaintiff, by an order of the court made in 1576, must within three terms, have the case set down for hearing.[2] The hearing was, as we have seen, in public;[3] and both parties could have the assistance of counsel.[4] After the reading of the evidence and the arguments of counsel "the lords proceed to their sentence, which is always delivered in great silence, and without any interruption, the inferior beginning, and so in order every man."[5] The views of the majority prevailed. But in case of equality of voices it seems to have been admitted, after some controversy, that the presiding judge—the Lord Chancellor or Lord Treasurer—had a casting vote.[6]

In the ordinary procedure of the court of Star Chamber we can see the influence both of the common law and of the continental ideas. In the manner of pleading, in the open hearing, in the liberty of defence, in the permission to employ counsel at all stages of the proceedings, we see the influence of the common law. In the obligation of the defendant to answer, and to submit to interrogatories on oath, in the secrecy of the examination of both defendant and witnesses, and in the manner of hearing the case on this written evidence we can see continental influences. But the ordinary procedure was not the only procedure which the court used. For extraordinary cases extraordinary methods of procedure must be employed; and it is in these extraordinary cases that the analogy with continental methods becomes closer. We may recall the fact that it was precisely this distinction between ordinary and extraordinary cases which had appeared at an earlier date on the continent; that the extreme harshness of this procedure was largely due to the fact that the extraordinary procedure had gradually become the ordinary procedure; and that familiarity with and acquiescence in the harshness of its methods had made it possible to increase progressively that harshness.[7]

We have seen that Hudson admits the existence of this extraordinary procedure, but that he deprecates its use in any but extraordinary cases.[8] But from other sources we can see that it was used, and that it reproduced two of the most dangerous features of the continental procedure. In the first place torture was freely used, to extort either a confession, or the disclosure of further information. In the second place the court considered

[1] Hudson, op. cit. 215. [2] Ibid 215, 216. [3] Above 156.
[4] Hudson, op. cit. 222. [5] Ibid 223.
[6] Ibid 30, 31, 223, 224; Les Reportes del Cases 4, 5, 320; Select Cases in the Star Chamber (S.S.) i *xxxiv* n. 2; Proctor's Case (1615) 12 Co. Rep. at p. 119.
[7] Above 173-175. [8] Above 165.



that it was free to disregard not only the ordinary rules of procedure, but also the ordinary rules of law.

(i) That torture was used all through this period is conclusively proved by the Acts of the Privy Council.[1] Jardine, in his "Reading on the use of Torture in the criminal law of England" gives numerous illustrations which show that, down to 1640, it was used, not only in the case of persons charged with offences against the safety of the state, but also in the case of persons charged with serious crimes having no reference to safety of the state; and that it was used, not only to extort confessions, but also to obtain a disclosure of accomplices.[2] But it is also clear from the works of Fortescue,[3] Smith,[4] and Coke,[5] and from the resolution of the judges in *Felton's Case*,[6] that the use of torture was wholly contrary to the common law. As Esmein has said, "torture is out of place in a purely accusatory procedure and in a free country;"[7] and, as we have seen, the criminal procedure of the common law was essentially accusatory, while England was universally regarded as a "dominium politicum et regale." Further, all these writers, though they say it is unknown to the common law, knew that it existed, and in some cases assisted in its application. Fortescue does not say that it did not exist in England. Smith (much against his will) was present at its infliction.[8] Coke, while attorney-general, had prepared documents which authorized its application;[9] and, in *The Countess of Shrewsbury's Case*, he seems almost to admit its legality.[10] It is clear also that after the resolution of the judges in *Felton's Case* it continued to be inflicted.[11]

[1] See e.g. Nicolas vii *xlvi-xlviii*; Dasent iv 171, 201, 284; v 235; xiii 37, 399, 401; for a case on the Pipe Roll of 24 Hy. II where the king gave a licence to torture see Pike, Hist. of Crime i 427.
[2] Jardine, Use of Torture App. [3] De Laudibus c. 27.
[4] De Republica Anglorum, Bk. ii c. 24—"Torment or question which is used by the order of the civill lawe and custome of other countreis to put a malefactor to excessive paine, to make him confesse of himselfe, or of his felowes or complices, is not used in England, it is taken for servile."
[5] Third Instit. 35—"There is no law to warrant tortures in this land, nor can they be justified by any prescription, being so lately brought in."
[6] Rushworth, Pt. I. vol. i 650-651—all the judges agreed that Felton could not be tortured by the rack, "for no such punishment is known or allowed by our law."
[7] History of Continental Criminal Procedure 107.
[8] Jardine, op. cit. 25.
[9] Spedding, Bacon's Letters and Life v 93 n.; vii 78, 79.
[10] (1612) 12 Co. Rep. at p. 96; speaking of the privileges of the nobility, he says—"For the honour and reverence which the law gives to nobility, their bodies are not subject to torture *in causa criminis læsæ Majestatis*"; as Hargrave says, 2 S.T. 774 n. *a*, his language as Attorney-General at the trials of the earls of Essex and Southampton bears out this view.
[11] Jardine, op. cit. 57—the last case occurred in 1640, ibid; and see S.P. Dom. 1640 191, cccliv 39; Gardiner, History of England ix 141. But it may be noted that in 1666-1667 it was suggested to the Secretary of State that a threat to use torture might be expedient, S.P. Dom. 1666-1667, 466, clxxxix 29; and that in 1678 the Lord Chancellor suggested that Prance's memory should be refreshed by making him view the rack, S.P. Dom. 1678, 593; moreover Mr. Senior has pointed out, Doctors'

What then is the explanation of this contradiction? We get the key to its solution in the manner in which the question was put to the judges in *Felton's Case*. The king, Rushworth tells us,[1] asked the judges "whether by the law he might not be racked, and whether there were any law against it, *for (said the king) if it might be done by law, he would not use his prerogative in this point.*" It is clear that the use of torture, though illegal by the common law, was regarded as legal if inflicted under the authority of that extraordinary power of the crown to supersede the common law on occasions of emergency, which was admitted to exist by most people in the time of the Tudors, and by very many in the earlier Stuart period. This is the view which is taken by Jardine,[2] Spedding,[3] and Gardiner;[4] and it seems to be obviously right. In other words, torture was used, and its use was justified in England, as its introduction and use was justified in France, on the ground that it was an extraordinary proceeding which the extraordinary power of the crown could justify.[5] And there are signs that in England, as abroad, its application was to some extent regulated by reference to those rules of proof which, according to the continental criminal procedure, must be satisfied in order to secure a conviction.[6] At any rate it is certain that civilians, who could not be ignorant of the rules of that procedure, were often instructed to be present at its infliction in terms which recall the rules of the civil law.[7]

Commons and the Old Court of Admiralty 102, that a commission which was issued in 1673 to eleven military officers and four D.C.L.s contemplates the use of torture.

[1] Op. cit. 650; Jardine, op. cit. 60-62 throws some discredit on Rushworth's narrative; but Gardiner, History of England vi 359 n. 2 believes that it is correct—as he says, "the position Charles was in after the grant of the Petition of Right would make him shy of using his prerogative unless he felt himself to be unquestionably justified in doing so."

[2] Op. cit. 59, 60—"When such writers as Fortescue, Coke, and Smith denounce the use of torture as illegal, they must be considered as speaking of it with reference to the common law of England, and its employment in the ordinary administration of justice; but they would probably have admitted that the use of the rack was lawful and justifiable by the English Constitution if warranted by the special command of the king"; cp. Pike, Hist. of Crime i 427, 498.

[3] "As the House of Commons now assumes the right to commit any commoner to prison for what it judges to be contempt of its authority, so the Crown then assumed the right to put any commoner to torture for what it judged to be obstinacy in refusing to answer interrogatories. As the judges cannot now call upon the House of Commons to justify the committal, so they could not then call upon the Crown to justify the torture," Letters and Life of Bacon v. 93.

[4] History of England vi. 358 n. 2. [5] Above 173-174.

[6] Jardine, op. cit. 64-65; "The vehement suspicion of guilt constantly recited in the warrants . . . corresponds to the *indicia ad torturam* amounting to the *semiplena probatio* required by the civil law"; also the distinction, "between bringing an accused person to the rack for the purpose of putting him in fear of it, and the actual torture, which also corresponds to the *territio* and the *tortura* of the civilians," ibid.

[7] "It seems to have been considered necessary [in the earlier instances] that one of the Masters of Requests should be present at examinations by torture . . . their presence was probably required in order that the rules prescribed by the civil law for the management of such examinations should be duly observed," ibid.



On the other hand, the continental rules of proof were not so strictly applied here as on the continent; and that led to a capriciousness in the use of torture which Selden notes as peculiar to the English practice.[1]

(ii) The same extraordinary power which could order the use of torture could equally dispense with the ordinary rules of procedure and the ordinary rules of law. And in spite of Hudson's views that these extraordinary powers ought to be used only occasionally, in spite of his assertion that most of the ordinary rules of procedure were in all cases binding even upon the Attorney General,[2] we can see from the Council records[3] and from Hawarde's reports, that the court was quite as ready on a suitable occasion to imitate the continental practice, and strain every point against the accused, as it was ready to imitate the continental theory and practice of torture. Thus in 1602 the Lord Keeper is reported as saying he would make a certain order, "even it be not the course of the court, for in such great cases, in which there was great mischief, and it was so necessary for the public good, a precedent was not necessary to direct them, but they could make an order according to the necessity and nature of the thing itself."[4] In 1603 Cecil said, "the king's justice is ordinary or extraordinary; and to proceed at the discretion of His Majesty's Committee of State is extraordinary and warranted by the statutes."[5] In 1606 the Lord Chancellor said, "Exorbitant offences are not subject to an ordinary course of law."[6] Hudson himself tell us that, in a case which affected the state, the Lord Chancellor had imprisoned certain witnesses who refused to give evidence, though he had himself admitted that this would not be done in ordinary cases;[7] and it is quite clear that the accused was not allowed to refuse to answer by invoking the privilege against self-crimination, which he possessed in ordinary cases.[8] *Lilburn's Case* (1637), which, as we shall see, had eventually a good deal to do with establishing this privilege in our modern law, shows that, at this period, the court, if it saw fit, would disregard it.[9]

The Council and Star Chamber were, as Hudson said, the

[1] "The rack is used nowhere as in England. In other countries 'tis used in judicature, when there is a *semi-plena probatio*, a half proof against a man; then to see if they can make it full, they rack him if he will not confess. But here in England they take a man and rack him I do not know why or when; not in time of judicature but when somebody bids," Table Talk (Ed. Reynolds) pp. 184, 185.

[2] Op. cit. 137; vol. i 501. [3] Above 185 n. 1.

[4] Les Reportes del Cases 144. [5] Ibid 177. [6] Ibid 292.

[7] Hudson, op. cit. 209. [8] Above 182.

[9] 3 S.T. 1315 seqq.; Wigmore, H.L.R. xv 624-625; vol. ix 199-200; for another instance where persons accused of libel were compelled to answer on pain of having the bill taken pro confesso see Les Reportes del Cases 146.

"Schola Reipublicæ." We shall now see that the common law courts and the common law, though to a certain extent they influenced their schoolmasters, in very many respects showed themselves apt pupils.

(*c*) *The influence of the common law upon the procedure of the Star Chamber, and the influence of the procedure of the Star Chamber upon the common law.*

We have already seen that we can trace the influence of the common law in the publicity of the hearing, in the methods of pleading, and, to a certain extent, in the methods of examining the defendant and witnesses adopted in ordinary cases.[1] But probably it is the restriction of the jurisdiction of the court to offences under the degree of capital which is the most striking instance of the influence of the common law. This meant that all cases of treason or felony were beyond its scope unless the crown was content to treat them merely as trespasses;[2] and we shall see that this limitation imposed upon the Star Chamber a procedure which was very much more favourable to the accused than either the continental procedure, or the procedure used in the courts of common law in cases of treason or felony.

It is, as we have seen, probable that this restriction upon the jurisdiction of the Star Chamber was due to the Parliamentary agitation of the fourteenth and fifteenth centuries against the extension of the jurisdiction of the Council.[3] Parliament contended that the Council had no jurisdiction over freehold, or over crimes punishable capitally, i.e. over treasons and felonies. In support of the latter restriction it relied upon an (historically) false interpretation of the thirty-ninth clause of Magna Carta (1215), which it attempted to fortify by statutes and petitions.[4] Though none of these statutes or petitions clearly barred the Council from the exercise of this jurisdiction, the feeling that such cases should be left to the common law was so strong that the government was compelled to yield to it. Any attempt to give the Council or Star Chamber jurisdiction in such cases would probably have provoked rebellion. Such an attempt would certainly have been declared to be contrary to Magna Carta and in subversion of the common law; and in the Star

[1] Above 156, 179-180, 181, 181-183.

[2] "All offences may be here examined and punished, if it be the king's pleasure, as treason and murder, felony and trespass; but there are not (sc.) all these offences punished as trespasses and not capitally," Hudson, op. cit. 62-63; "if these capital offences shall be proceeded against capitally, then must men be tried by course of indictment by their peers *per legem terræ;* neither can any suits be commenced of this nature but by the king, who hath power to remit the greater, which is felony; for a subject may not prefer a bill for any such offence, thereby to draw the examination of a crime that is capital," ibid 64-65.

[3] Vol. i 488.

[4] Ibid 59-62, 487.



Chamber itself breaches of Magna Carta and deliberate departures from the common law were not regarded with favour.[1]

We should remember also that the feeling that the more serious crimes should be tried by the older procedure was not confined to England. Esmein tells us that, when the inquisitorial procedure was being introduced into France, it could not at first be applied to the more serious crimes.[2] But in France the older procedure was too archaic to hold out permanently against the new procedure. In England, on the other hand, the common law procedure had been rationalized. It had greater powers of resistance; and therefore it was able, not merely to delay the application of the newer forms of procedure to serious crimes, but to prevent these newer forms from ever being applied to them.

Now this limitation of the jurisdiction of the Star Chamber to less serious criminal cases meant that it was practically impossible to fetter the defence of the accused in the way in which it was fettered abroad. The excuse of paramount public policy could not so well be invoked. Thus in the Star Chamber the accused had every opportunity to collect his evidence and to state his case; and in all stages he had the assistance of counsel.[3] For this reason it became practically impossible for the Star Chamber to introduce into its ordinary procedure those harsh rules which disfigured the criminal procedure of the continent. But the same feelings which in France induced popular opinion to acquiesce in, and even to approve the severities of the inquisitorial procedure,[4] in England made it possible to introduce changes into the criminal procedure of the common law which gave far greater advantages to the crown than it had ever possessed before.

There is no evidence that these changes were unpopular. On the contrary there is a good deal of evidence that they commanded popular approval.[5] And the reasons why they were popular were much the same in England as they were abroad. The maintenance of a strong government was felt, and felt rightly, to be the only security for peace and order.[6] But the

[1] In 1595 certain acts of Sir W. Raleigh as Lord Warden of the Stannaries were said to be contrary to Magna Carta, and it was affirmed that the common Law was "the surest and best inheritance that any subject hath, et qui perde ceo perde tout, Hawarde, Reportes del Cases 96.

[2] Above 173.

[3] Above 179; see Dasent x 249 (1578), a prisoner in the Marshalsea allowed to see his counsel, Plowden and Gaudy; he was said to be indicted—probably for a misdemeanour; as the Star Chamber only dealt with misdemeanours the common law rules applicable to the trial of these matters were applied in the Star Chamber.

[4] Above 175-176.

[5] Gardiner, History of England i 124, 125.

[6] One of the best accounts of this state of feeling is to be found in Mr. John Pollock's book on The Popish Plot 265-267; as is there pointed out, at pp. 266-267,

government had no standing army and no force of police. It was exposed to intrigues from without and to sedition from within. "The state was always in danger, the government always battling for its own life and the safety of society, the morrow always gloomy for the success of their cause."[1] Thus the state trials of the period were regarded, not as impartial enquiries into the guilt or innocence of a prisoner, but as incidents in the never ceasing warfare between the state and its enemies. "Judges and jurors alike," says Mr. John Pollock,[2] "were engaged in the recognized task of the defence of the state. To the hearers it was no quaint piece of antiquated phraseology when the clerk of the crown addressed the prisoner arraigned at the bar for high treason: 'These good men that are now called, and here appear, are those which are to pass between you and our sovereign lord the king, upon your life and death;' it was a sober expression of vivid truth. The jury stood between the king's life and the intrigues of a defeated malefactor." We have seen that abroad the extraordinary procedure, which gave great advantages to the prosecution, somewhat easily became the ordinary procedure in all criminal cases.[3] Just so in England, some of the rules of criminal procedure which were approved because they gave enormous advantages to the crown in all state prosecutions, soon became the ordinary rules of criminal procedure. Some of the continental ideas, which, for want of jurisdiction, the Star Chamber could not directly apply to cases which came before it, were indirectly made to influence the somewhat vague and indeterminate rules of the criminal procedure of the common law, and continued to influence it long after the Star Chamber had ceased to exist.

Of some of the developments in the growth of the criminal procedure of the common law during this period I shall speak in the Second Part of this Book.[4] Here I shall only deal with certain features in it which seem to have been influenced by the continental ideas.

(*i*) I have already said something of the statutes which made it more difficult for a person accused of treason or felony to get

from the beginning of the Reformation to the Revolution, "besides conflict with foreign powers, war and rebellion, constant in Scotland and almost chronic in Ireland, there may be counted in eight reigns three completed revolutions, ten armed rebellions, two great civil wars, and plots innumerable; all emanating from the English nation alone"; there were constant foreign plots; and the result was that, "Whereas government is now looked on as a means of getting necessary business done, of ameliorating conditions of life, and directing the energy of the country to the highest pitch of efficiency, two centuries and a half ago it was anxiously watched as an engine of attack or defence of persons, property and conscience"; clearly the criminal law should be made as efficient an engine of attack as possible.

[1] Pollock, op. cit. 267. [2] Ibid 286-287.
[3] Above 173-174. [4] Vol. ix 222-236.



released on bail.[1] When bail was refused, the prisoner was kept in prison till his trial with no means of preparing his defence.[2] We have seen that it was becoming customary to issue warrants for the arrest of persons suspected of treason or felony on the application of anyone who could show good ground of suspicion;[3] and the courts were quite ready to hold that a commitment to prison "per speciale mandatum regis" was a sufficient ground for refusing to release a prisoner on a writ of habeas corpus.[4] Further, we have seen that statutes of Mary's reign required the magistrate to examine the prisoner inquisitorially, and to take the evidence of those who brought him.[5] The magistrates interpreted their powers widely. They actively got up the case against the prisoner, not only by questioning him and the witnesses against him, but also by searching for evidence against him.[6] We have seen that these examinations were conducted secretly, and that the evidence was communicated to the prosecutor and the judge but not to the prisoner.[7] It appears from Smith's account that the results of this examination of the prisoner and the witnesses played a very important part at the trial.[8] In important cases in which the state was affected these examinations were conducted by the Council or by the judges.[9] In such cases they formed, as Gardiner has said,[10] the real trial; and it was, as we have seen, in these cases that torture was freely employed. If we look at the way in which the increased powers of detention, and the new powers of preliminary examination were used, we cannot help seeing that the manner of their use was influenced by the continental ideas. No doubt the example and the encouragement of the Council and Star Chamber helped to teach the ordinary justices of the peace to use their new powers in this way—a lesson which tends to the magnifying of the office of an official is somewhat easily learned. The justices were generally ready enough to hunt down and examine criminals. They could not torture them; but there was very

[1] Vol. iv 527-528. [2] Stephen, H.C.L. i 250.
[3] Vol. i 294-295; vol. iii 600-601. [4] Vol. iv 87, below App. I.
[5] Vol. i 296; vol. iv 529-530.
[6] Vol. i 296; for some other illustrations see J. Pollock, The Popish Plot 269-276; Stephen, H.C.L. i 222-225.
[7] Vol. i 296; Stephen, H.C.L. i 225-228; Dasent vi 310-311 (1558)—the judges of the King's Bench who are to try a prisoner are to get a copy of his examination from the attorney and solicitor general; ibid 324, 325—a direction to the justices of Oyer and Terminer that they are not to try a prisoner till the judge of Assize comes, as he has the copy of the prisoner's examination.
[8] De Republica Anglorum, Bk. II. c. 23—"If they which be bound to give evidence come in, first is read the examination, which the Justice of the peace doeth bring in: then is heard (if he be there) the man robbed what he can say etc.;" Pt. II. c. 7 § 2.
[9] Vol. i 296 n. 6. [10] History of England i 125.

little law as to the kind of pressure which might or might not be applied to make them speak.[1]

(*ii*) From a very early period persons accused of treason or felony were refused the help of counsel.[2] This rule was sternly insisted upon all through this period; and, when its justice began to be questioned, Coke justified it partly on the ground that the court was counsel for the prisoner—a view which was clearly not acted upon in the important state trials of the period; and partly on the ground that, it being for the prosecutor to prove his case so clearly that no defence to it was possible, no counsel was therefore needed.[3] This latter mode of reasoning was, as we shall now see, directly connected with ideas derived from the criminal procedure of the continent.

(*iii*) In the earlier part of this period the prisoner was not allowed to call any witnesses.[4] Even at the latter part of this period, when he was allowed to call them, they were not examined on oath.[5] Nor had he any means of "ascertaining what evidence they would give, or of procuring their attendance."[6] These rules seem to have sprung partly from the absence of any clear law of evidence, but chiefly from the reception of some of the civil law rules as to the admissibility of evidence in criminal cases. We have seen that, at the beginning of the sixteenth century, the practice of summoning witnesses to testify to a jury was a new practice.[7] The question whether witnesses should be allowed to testify to a jury was a question which the court could decide as it saw fit. Naturally the court was ready enough to facilitate the calling of witnesses by the crown;[8] and equally naturally the crown opposed the grant of any similar right to the prisoner.[9] But how could such unfair

[1] See Elizabethan Rogues and Vagabonds (Oxford Historical Literary Studies vol. i) 38-39 for a tale from Harman of how he and a surgeon compelled a pretended dumb man to speak—"he had him into a house and tyed a halter about the wrests of his handes and hoysed him up over a beame, and there dyd let him hang a good while; at the length, for very paine he required for God's sake to let him down."

[2] This goes back to Anglo-Saxon days, see vol. ii 106-107; it is recognized in Y.B. 30, 31 Ed. I. (R.S.) 530; and it had attained its modern form in Y.B. 9 Ed. IV. Pasch. pl. 4—"*Et nota* que le defendant en endictment de felony n'avera counsel vers le Roy s'il ne soit matter en ley: mes en appel auter est."

[3] Third Insist. 29—"The true reasons of the law in this case are: First that the testimonies and proofs of the offence ought to be so clear and manifest, as there can be no defence of it. Secondly the court ought to be instead of counsel for the prisoner, to see that nothing be urged against him contrary to law and right."

[4] Thayer, Evidence 157 n. 4, citing Throckmorton's Case (1554) 1 S.T. 869, 882, and Udal's Case (1590) 1 S.T. 1271, 1281, 1304; he points out that neither Smith nor Staunford say anything of witnesses for the prisoner.

[5] Thayer, Evidence 160 n., citing Tyndall's Case (1632-1633) Cro. Car. 291.

[6] Stephen, H.C.L. i 350.

[7] Vol. i 334-335; vol. iii 648-650. [8] Vol. i 335.

[9] As Gardiner says, op. cit. i 125, 126—"When the previous depositions formed almost, if not entirely, the whole of the evidence, a jury would be likely to attach considerable weight to the mere fact that the prisoner had been committed for trial."



treatment be justified? It could not be justified by any reason in English law. But continental systems, as we have seen,[1] justified it on the ground that the prosecutor must make his case so plain that it would be useless to look at any contrary testimony. This explanation, which rested on the continental theory of proof, was eagerly adopted by the common law judges.[2] But it is clear from statutes of 1589[3] and 1607[4] that this refusal to allow the accused to call witnesses was beginning to shock public opinion. The expedient was therefore resorted to of allowing the accused to call witnesses, but of refusing to allow them to be sworn. But this was a wholly illogical compromise. The explanation given of the older rule did not fit in very well with a system which had not received the continental system of proof. But for the newer rule no possible explanation, based either on English law or continental law, could be given. Hale said that he could find no reason for it.[5] But it gave advantages to the government; and so it was maintained as a rule of criminal procedure till the legislature intervened to remove it at the end of the seventeenth century.[6]

(*iv*) The conduct of a criminal trial recalls some of the features of the continental procedure. "At the trial," says Stephen,[7] "there were no rules of evidence as we understand the expression. The witnesses were not necessarily (to say the very least) confronted with the prisoner, nor were the originals of documents required to be produced. The confessions of accomplices were not only admitted against each other but were regarded as specially cogent evidence." Moreover the state trials of the period, and Smith's account of a criminal trial, show that the prisoner himself was closely questioned by the witnesses or prosecuting counsel.[8] The privilege against self-crimination

[1] Above 175.

[2] "In criminalibus probationes debent esse luce clariores," Third Instit. 210; Whitebread's Case (1679) 7 S.T. 359 *per* Scroggs C.J., cited Thayer, Evidence 160, 161 n.

[3] 31 Elizabeth c. 4. [4] 4 James I. c. 1 § 6; see Thayer, Evidence 159 n.

[5] Pleas of the Crown ii 283—"Regularly the evidence for the prisoner in cases capital is given without oath, tho' he reason thereof is not manifest."

[6] 7 William III. c. 3 (treason); 1 Anne c. 9 (treason and felony).

[7] H.C.L. i 350; J. Pollock, The Popish Plot 292-295.

[8] De Republica Anglorum, Bk. II. c. 26, having explained that the witnesses against the prisoner are first sworn, he says—"The Judge asketh the partie robbed if he knowe the prisoner, and biddeth him looke upon him: he saith yea, the prisoner sometime saith nay. The partie pursuivant giveth good ensignes . . . . The theefe will say no, and so they stand awhile in altercation, then he telleth al that he can say: after him likewise all those who were at the apprehension of the prisoner, or who can give any *indices* or tokens which we call in our language evidence against the malefactor;" Stephen points out, H.C.L. i 325-326, that every statement of counsel operated as a question to the prisoner, and indeed they were constantly thrown into the form of questions . . . the result was that . . . the examination of the prisoner which is at present scrupulously, and I think even

was wholly unknown to the common law of this period. It is not until after the Restoration that this privilege was recognized. All through this period the prisoner was closely examined by the magistrate before the trial, and by the judge and prosecuting counsel at the trial.[1]

(*v*) We have seen that the use of torture, though illegal by the common law, was justified by virtue of the extraordinary power of the crown, which could, in times of emergency, override the common law.[2] We shall see that Coke in the earlier part of his career admitted the existence of this extraordinary power.[3] He therefore saw no objection to the use of torture thus authorized.[4] But we shall see that his views as to the existence of this extraordinary power changed, when the constitutional controversies of the seventeenth century had made it clear that the existence of any extraordinary power in the crown was incompatible with the liberty of the subject.[5] It is not surprising therefore, that, in his later works, he states broadly that all torture is illegal.[6] It always had been illegal by the common law, and the authority under which it had been supposed to be legalized he now denied. When we consider the revolting brutality of the continental criminal procedure,[7] when we remember that this brutality was sometimes practised in England by the authority of the extraordinary power of the crown, we cannot but agree that this single result of the rejection of any authority other than that of the common law is almost the most valuable of the many consequences of that rejection. Torture was not indeed practised so systematically in England as on the continent; but the fact that it was possible to have recourse to it, the fact that the most powerful court in the land sanctioned it, was bound sooner or later to have a demoralizing effect upon all those who had prisoners in their power.[8] Once torture has become acclimatized in a legal system it spreads like an infectious disease. It saves the labour of investigation.[9] It hardens and brutalizes those who have become accustomed to use it. We

pedantically, avoided, was the very essence of the trial. . . . The whole trial in fact was a long argument between the prisoner and the counsel for the Crown, in which they questioned each other and grappled with each other's arguments with the utmost eagerness and closeness of reasoning;" Wigmore, H.L.R. xv 629; Udal's Case (1590) 1 S.T. 1271, 1275, 1289 there cited.

[1] Wigmore, The Privilege against Self-crimination, H.L.R. xv 627-634; Pt. II. c. 7 § 1.

[2] Above 186. [3] Below 427, 451, 452. [4] Above 185 n. 10.

[5] Below 451, 452. [6] Above 185 n. 5. [7] Above 174-175.

[8] Cp. above 192 n. 1.

[9] Stephen was told that one of the reasons why native police officers in India occasionally tortured prisoners was laziness—"It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence," H.C.L. i 442 n. 1.



shall see that Coke, more than any other single man, helped to secure the victory of the principle that the common law is supreme in the state.[1] To him therefore we must chiefly give thanks for preventing the progressive demoralization of our criminal procedure, by making the use of torture legally impossible.

In these various ways the criminal procedure of the common law was, during this period, influenced by the continental ideas. It seems to me that, though these ideas were not and could not be applied in the Star Chamber, the Council and the Star Chamber had some influence in gaining the acceptance of the common law for some of them. Some at least of the members of the Council and Star Chamber were acquainted with them. The judges were to a large extent directed and controlled by the Council. All classes agreed that a stern criminal law was necessary to insure the safety of the state, and the security of life and property. We cannot wonder therefore that some of the rules of a procedure, which was in all its parts designed to secure these objects, should be copied. Fortunately it was not possible to copy these rules in their entirety. But enough was copied to give the criminal procedure of this period a very bad name among historians who have compared it, not with the contemporary continental criminal procedure, but with the criminal procedure of our own times. It is clear that the former standard is the fairer of the two. Tried by this standard, or even by the standard of the continental criminal procedure of modern times, it was, in the opinion of Stephen,[2] conspicuously fair to the accused. It is true that the prisoner was prevented from calling witnesses and preparing his defence; that he was deprived of the help of counsel, and repeatedly questioned both before and during his trial. It is true that torture was administered in some cases to make him disclose what he knew; and that the court did not start with any presumption in favour of his innocence. But the trials were at least public, and the prisoner was allowed to make what statements he liked. "His attention was pointedly called to every part of the case against him, and if he had a real answer to make he had the opportunity of bringing it out effectively and in detail. It was but seldom that he was abused or insulted . . . the real point at issue was usually presented to the jury not unfairly."[3] Obviously this public oral trial presented many more opportunities to a prisoner than the secret enquiry based on written depositions, which, on the

[1] Below 450-454. [2] H.C.L. i 356.

[3] Stephen, H.C.L. i 355.

continent, had taken the place of a trial.[1] Both the common law courts and the Star Chamber sometimes professed to believe in the maxim that it is better to let many guilty escape than convict one innocent person;[2] and we have seen that this belief had been translated by the common lawyers into concrete rules of procedure and pleading which gave, as they were intended to give, many advantages to the accused.[3] No continental criminal court could ever have professed such a belief—their whole procedure was based upon the opposite view. Though we condemn this view, it is only fair to those who held it to remember that, as late as the eighteenth century, it was approved by no less a man than Paley.[4]

There is one lesson which can, I think, be learned from the history of the development of the continental and the English criminal procedure of this period. We have seen that the manner in which the accused was either deprived of or hampered in his liberty of defence, and the systematic use of torture, which make the history of this branch of the law one of the most revolting episodes in the history of mankind, were not only tolerated, but even applauded by a large body of public opinion. We have seen that they were applauded because the government was so weak and its enemies were so strong that it was felt, not without reason, that it must take every advantage of its enemies. It was, as Stephen has said, "not strong enough to be generous."[5] It would seem to follow, therefore, that the maintenance of a strong government and of habitual respect for the law are the conditions precedent for the existence of a criminal procedure which is fair to the accused. If a government once allows any body of men to become so strong that they can defy the law with impunity, if by its conduct it destroys that instinctive respect for the law to which civilized nations have painfully attained, it will be obliged, in order to regain its lost authority, to resort to methods similar to those which were found to be necessary in the sixteenth century. A nation cursed with such a government will begin to fear its criminals; and fear, as Gardiner has said,[6] is the parent of cruelty.

[1] Smith, De Republica Anglorum, Bk. II. c. 26, specially notes the contrast between the continental procedure and the public and oral character of the English procedure.

[2] Fortescue, De Laudibus c. 27, cited vol. iii. 620; "it was well sayde by them that it were better to acquite twenty that are guytlie than condempne one Innocente," Hawarde, Les Reportes del Cases 320.

[3] Vol. iii 620.

[4] Principles of Moral and Political Philosophy ii 310, cited J. Pollock, The Popish Plot, 303.

[5] H.C.L. i 355.

[6] History of England i 124, 125—"We live in days when, happily, it has become almost impossible to conceive of a treason which should really shake the country. Consequently, a person accused of this crime is in our eyes, at the most, a misguided person who has been guilty of exciting a riot of unusual proportions. We cannot work our minds up to be afraid of him, and fear, far more than ignorance, is the parent of cruelty."



But we must return to the court of Star Chamber. We shall now see that its influence upon the substantive law of crime and tort was similar in kind to its influence upon the criminal procedure of the common law; but that that influence was in some respects more direct and more permanent in its character.

(ii) *The influence upon English law of some of the substantive rules of law enforced in the Star Chamber.*

I have already dealt with the new principles of public law which were enforced by the Council and Star Chamber. We have seen that they tended to introduce a closer control of the servants of the crown, and a set of new ideas as to the relations between the crown and its servants.[1] I have also dealt with the manner in which the law as to forgery and perjury was developed by the Star Chamber.[2] Here I must indicate the manner in which it developed in a similar manner the law as to certain other criminal offences under the degree of felony. We have seen that, at the latter part of the mediæval period, the delictual aspect of trespass had been developed by the common law at the expense of its criminal aspect; and that in consequence the criminal law badly needed to be strengthened.[3] This was apparent even in the mediæval period from the cases which came before the Council.[4] With the manner in which it was strengthened by the legislature I have already dealt.[5] We must now look at the manner in which it was strengthened both by the direct action of the Star Chamber, and by the example of activity in the repression of crime which it set to other courts.

We can trace this influence of the Star Chamber in seven directions:—(*a*) Violent wrongdoing; (*b*) Attempts to commit crimes; (*c*) Maintenance and other offences against the administration of justice; (*d*) Conspiracy; (*e*) Libel and slander; (*f*) Fraud; (*g*) Acts contrary to public policy.

(*a*) *Violent wrongdoing.*

The Star Chamber dealt with many forms of violent wrongdoing.[6] First come the offences of riot, rout, and unlawful assembly. We have seen that some of them had been dealt with by the legislature.[7] But as a rule the legislature dealt only with

[1] Vol. iv 85-87.

[2] Ibid 502-503, 516-519.

[3] Vol. iii 317-318, 370-371; vol. iv 512-513.

[4] The nature of the cases which came before the Council in the mediæval period, when Chancery and the Council worked together, will be seen from my account of some of the early Chancery Cases, below 289-291.

[5] Vol. iv 492-532.

[6] Hudson, op. cit. 82-88.

[7] Vol. iv 497, 503, 513; some of these statutes are mentioned by Hudson, op. cit. 84.

particular cases; and, even when a particular statute was applicable, the Star Chamber could often deal with the offence more effectually than the common law courts. A large number of such cases therefore came before it;[1] and we can see that its treatment of them was giving rise to some of the principles of our modern law. Thus we get the principle that there must be at least three persons present to constitute these offences.[2] We get almost the modern definitions of these offences stated both by Hudson and Coke;[3] and it is reasonably clear from the definitions given by Hudson, and from the fact that Coke can cite no authorities from the Year Books, that these definitions originated with the Star Chamber. Hudson says of a riot, "it is called a riot when three or above assemble themselves together to do an unlawful thing and do it;" of a rout that it is "when they only assemble themselves together to do an unlawful thing and do it not;" of an unlawful assembly that it is "when two or more assemble themselves together to do some unlawful thing."[4] From the point of view of our modern law these definitions are too wide. But Hudson probably meant in each case to say that the unlawful act in question must be an act of violent wrongdoing, as the section in which he thus defines them deals wholly with this kind of wrongdoing. If this view as to his meaning be accepted, his definitions agree in substance with those given by Coke,[5] and with our modern law.[6] It is true that his definition of a rout is loosely worded; but it would seem, from the explanation which he gives a little later,[7] that, here again, he intended to lay down much the same rule as Coke, who defined it, in substance, as an assembly which does any act towards the carrying out of their purpose of committing

[1] For some specimen cases see Select Cases in the Star Chamber (S.S.) i 237-253 (1507); Reportes del Cases 103, 139, 140; Balfield v. Poppleton and others (1625) Rushworth, Pt. II. vol. ii App. I.; in any selection of cases those in which some sort of riotous conduct is alleged are much the most common.

[2] Hudson, op. cit. 82; Coke, Third Instit. c. 79; Les Reportes del Cases 157.

[3] Hudson, op. cit. 82; Coke, Third Instit. c. 79. [4] Op. cit. 82.

[5] Riot, "in the common law signifieth, when three or more do any unlawful act, as to beat any man, or to hunt in his park chase or warren, or to enter or take possession of another man's land, or to cut or destroy his corn grass or other profit"—all the illustrations are of forcible wrongdoing, though the fact that the wrongdoing must be forcible is not specifically stated; Rout "signifieth when three or more do any unlawful act for their own or the common quarrel, as when commoners break down hedges or pales"; "An unlawful assembly is when three or more assemble themselves together to commit a riot or rout and do it not," Coke, Third Instit. c. 79.

[6] Kenny, Criminal Law, 280-284.

[7] "For routs, they are for the most part dangerous, for that they arise upon public grievances, as inclosing of commons, making of May games, as it was in the Earl of Lincoln's case. And I have heard Henry Earl of Lincoln in a private discourse say, that the Earl of Essex's insurrection in London was but a rout, but he dared not but find it treason. But by the statute of 7 R. II. c. 8 they were declared traitors;" it should be 5 Richard II. st. 1. c. 6, vol. ii. 450 n. 2.



some crime by force. His description of unlawful assembly would seem to include both the elements of purpose to commit forcible crime, and terror thereby caused to peaceable persons;[1] and, according to the best opinion, these are the two essential elements of this offence in our modern law.[2]

Of the other offences enumerated by Hudson some were sufficiently dealt with by the common law; and the influence of the Star Chamber was directed to the enforcement of the existing law, rather than to the creation of any new rules. Instances of offences of this kind are forcible entry, forcible taking of goods, and aggravated assaults.[3] Also, like other courts, it dealt severely with those who assaulted its members or those practising before it.[4] The only other form of violent wrongdoing in which it made a considerable addition to the law was in respect of the law as to duelling.[5]

To substitute the rule of law for the rule of force is the first object of the law. "Revenge,"[6] as Coke said, "belongeth unto the magistrate." But, down almost to our own times, the law did not succeed completely in suppressing this particular manifestation of the rule of force. A false sentiment of honour prevented a recourse to law, and was supposed both to justify and to necessitate a recourse to arms. And, as this sentiment was prevalent chiefly among the governing classes, upon whose sense of honour the government largely relied, it is not surprising that the law was unable to suppress this particular result of a perverted sense of honour. It has not been and cannot be suppressed till the sentiment of honour upon which it was based is recognized to be false.

The attitude of the common law was from the first quite clear. Unless the duel was fought in hot blood on a sudden falling out,[7] the man who killed his opponent was guilty of murder;[8] and his second, and probably the second of the murdered man, were accessories before the fact.[9] If a third person intervened to stop the fight and was killed by the combatants, both were guilty of murder.[10] If two persons fought, and neither was killed, both

[1] "And it seemeth by Keble 3 H. 7 that an assembly of men is not punishable, if nothing be done, unless the assembly be *in terrorem populi*," Hudson, op. cit. 85; the reference is to Y.B. 3 Hy. VII. Hil. pl. 1, but the dictum is the court's not Keble's.

[2] Kenny, op. cit. 281.

[3] Hudson, op. cit. 85-87, 88. [4] Ibid 88.

[5] Ibid 87-88; on the whole subject see Stephen, H.C.L. iii 99-102.

[6] Third Instit. 157.

[7] R. v. Taverner (1617) 3 Buls. at p. 171 *per* Coke C.J.; Hale, P.C. i 453.

[8] Third Instit. 157-158; R. v. Taverner (1617) 3 Buls. 171; Stephen, H.C.L. iii 100-101.

[9] Hale, P.C. i 443, 453; Stephen, H.C.L. iii 101-102.

[10] Fitz. Ab. *Corone* pl. 262 (22 Ed. III.)—"Deux fueront arraines de mort d'un A, et trouve fuit que ils fueront a travers et debate, et l'un voile quarelle parcusse l'auter

were guilty of an affray,[1] a minor offence with which the court leet could deal.[2] If either or both were wounded, either or both were guilty both of an affray and of an assault and battery.[3] But the common law was defective in that it did not penalize the preparations for a duel—the giving or receiving or returning of a challenge, the arranging of the place and time, departing for the place at which it was arranged that the duel should take place. If a sheriff or officer did not stop an affray he might be held liable—but that was the utmost extent to which the common law went.[4] What was wanted was a law which would enable the authorities to nip the preparations in the bud, and not oblige them to wait till a crime had been committed. And the number of duels which were fought at this period made a remedy very necessary.[5] This necessary remedy was applied by royal proclamation,[6] and enforced by the Star Chamber.[7] It punished all preparations for duels by fine and imprisonment—"all the middle acts and proceedings which tend to the duel";[8] and it based its interference on sound principles of public policy. "Those insolent persons," said Hobart C.J. in the Star Chamber, "take upon them to frame a law and commonwealth to themselves, as if they had power to cast off the yoke of obedience to peace and justice. And therefore they enact among themselves as an undoubted position, that a man wronged may with his sword in his hand require satisfaction of any man, being no Privy Councillor, and with a mild word to qualifie the detestation of this kind of murther, they have made it a familiar phrase, that he was killed fairly, and he was killed in equal fight; which arrogancy and rebellion must be subdued by this Court, censuring the best. And by judges and jurors, who must not give way to this impious distinction of fair and foul killing, but must execute the law with severity upon all murtherers; for the law knows no such distinction."[9] Possibly the practice of duelling might have been suppressed sooner if the

ove son cotel, et l'auter luy en meme la maniere, et cesty A vient parenter eux par eux departir, et parenter eux il fuit occise per que ils fueront ambideux pend par ce que chacun d'eux fuit en volonte d'avoir occiser auter; issint ne fuit dit per infortuniam."

[1] Third Instit. 158.
[2] Y.BB. 4 Hy. VI. Hil. pl. 2; 8 Ed. IV. Pasch. pl. 17.
[3] Stephen, H.C.L. iii 100. [4] Third Instit. 158.
[5] Spedding, Letters and Life of Bacon iv 396, citing a letter of Chamberlain of Sept. 9, 1613.
[6] Tudor and Stuart Proclamations nos. 1134, 1142, 1143, 1184, 1636.
[7] Hudson, op. cit. 87; see Spedding, op. cit. iv 399-409, for Bacon's speech in the case of Priest and Wright; and ibid 409-416, for the decree of the Star Chamber made in that case, which was ordered to be read at the Assizes.
[8] Spedding, op. cit. iv 403: see Atty.-Gen. v. Kelly (1632) Cases in the Star Chamber and High Commission (C.S.) 112-115—an information against Kelly *ore tenus* for sending a challenge.
[9] Lord Darcy of the North v. Gervase Markham (1616) Hob. at p. 121.



Star Chamber had continued to exercise this jurisdiction upon these principles.[1]

(*b*) *Attempts to commit crimes.*

It is clear that by thus dealing with duels the Star Chamber was acting on the principle that an attempt to commit a crime is a substantive offence. The court, in the case of *Priest and Wright*, agreed with Bacon's argument, and rested its judgment upon the general principle that, "Wheresoever an offence is capital or matter of felony if it be acted and performed, then the conspiracy, combination, or practice tending to the same offence, is punishable as a high misdemeanour, although they never were performed. And therefore that practice to impoison though it took no effect, and the like, have been punished in this court."[2] Further, the court said, it appeared from Garnon's case that "a crime of a much inferior nature, the suborning and preparing of witnesses, though they never were deposed, or deposed nothing material, was censured in court."[3] Hudson cites one or two cases in which the court acted upon this principle.[4]

It cannot be doubted that this doctrine effected a great improvement in the criminal law. We have seen that, at one time, the want of any such doctrine had led some of the judges to lay down the very much wider rule that the mere intent was punishable, though the act was not accomplished. But we have seen that, except in the case of treason, this doctrine did not prevail.[5] The result was that unless an attempt was itself a specific crime, e.g. an assault, it was not punishable at all.[6] The doctrine of the court of Star Chamber was so obviously necessary to any reasonable system of criminal law that it was adopted by the common law courts.[7]

(*c*) *Maintenance and other offences against the administration of justice.*

We have seen that in the Middle Ages maintenance and champerty were crimes which endangered the peace of the state, and that in consequence almost any interference in a lawsuit rendered the party so interfering liable to the penalties for maintenance.[8] In Henry VII.'s reign maintenance is given

[1] For proclamations against the practice in the latter part of the seventeenth century see Tudor and Stuart Proclamations nos. 3245, 3710; and for a bill of 1668, which proposed to penalize heavily preparations for duels, and to give the earl Marshal and his deputies jurisdiction over the quarrels which gave rise to duels, see Hist. MSS. Com. 8th Rep. App. Pt. I. 122, no. 168; vol. i 579.
[2] Spedding, Letters and Life of Bacon iv 412.
[3] Ibid. [4] Op. cit. 108. [5] Vol. iii 373 and n. 4.
[6] Stephen, H.C.L. ii 223-224. [7] Ibid.
[8] Vol. i 335; vol. ii 459; vol. iii 394-400.

the first place in that list of crimes which the statute Pro Camera Stellata [1] was passed to suppress. This statute, and the vigorous administration of Henry VII. and his son, effectually stopped the kind of maintenance which endangered the peace of the state; and as Stephen points out,[2] this fact is clearly shown by the later statute of 1540.[3] "The whole turn of the statute shows that the type of the crime had changed. Instead of references to conspirators, liveries, and badges, and other forcible perversions or open defiances of the law, the statute deals with the importance of 'true and indifferent trials of such titles and issues as been to be tried according to the laws of this realm.' This object is greatly hindered by 'maintenance, embracery, champerty, subornation of witnesses, sinister labour, buying of titles and pretensed rights of persons not being in possession.' . . . Provisions are there made against buying 'pretensed rights or titles.' The old conflict between the law and those who wish to break it by open force is at an end, and fraud, perjury, and chicanery have taken the place of violence."

This change in social and political conditions naturally affected the nature of the offence. We shall see that it was coming to be recognized that a debtor could assign money owed to him to a creditor;[4] and the exception, which had from the first been allowed in favour of attorneys and counsel,[5] was being somewhat more widely construed.[6] We can see too from Hudson's treatment of the subject that there was a tendency to expand somewhat the scope of the recognized defences in proceedings for maintenance—common interest,[7] charity,[8] relationship,[9] the prosecution of causes on behalf of the king.[10] In fact, the establishment of the last named of these defences seems to be the origin of the modern rule that the doctrine of maintenance does not

[1] 3 Henry VII. c. 1. [2] H.C.L. iii 239.

[3] For this statute see vol. iv 518, 521; for two typical cases see Atty.-Gen. v. Caston (1633) Rushworth, Pt. II. vol. ii App. 44, 45; Dymock v. Chambers and Dee (1633) ibid 46, 47.

[4] Reportes del Cases 300-331; vol. vii 534-537. [5] Vol. i 313, 491.

[6] Reportes del Cases 331—it was ruled that they could not disburse money for their clients; but that a man could write to an attorney to instruct or retain counsel, or to take out process; this was said to be, "so common and necessary for the poore of the Cuntrye," that "though an offence this Courte will not sentence it."

[7] Hudson, op. cit. 90-91, citing Y.B. 15 Hy. VII. Hil. pl. 3; ibid. 95—a defendant may maintain the suit of his co-defendant; cp. Amerideths Case (1600) Moore K.B. 562 pl. 764.

[8] Hudson, op. cit. 90.

[9] Ibid 90—though how far this defence extended was perhaps a little uncertain.

[10] Ibid 89-90—"It is lawful for any man to disburse money in the prosecution of any cause for the king, as an indictment or any information in the exchequer or Star Chamber on the king's part . . . and therefore the maintaining of suits in the Star Chamber mentioned in the statute of 32 Hy. VIII. are to be understood of the defendant's part."



apply to criminal prosecutions.[1] On the other hand it was held both at common law and in the Star Chamber that a mere agreement to maintain was punishable, and a fortiori if it was further agreed to divide the profits.[2]

The other offences mentioned in the statute—"the preparing, labouring, and soliciting of jurors," and "the buying of pretensed titles," were dealt with both by the common law and the Star Chamber;[3] and it cannot be doubted that the success of the Star Chamber in preventing the corruption or intimidation of jurors has had a good deal to do with the efficiency of the jury in our modern law. Here, as in other cases, it brought a mediæval institution up to the standard of efficiency demanded by the more exacting requirements of a modern state.[4] If the fining and imprisoning of jurors for returning verdicts which, in the opinion of Star Chamber, were wrong or foolish, has given that court a bad name in our constitutional history, let us in fairness remember that the control over juries, which it exercised in other directions, helped to restore to the jury its independence, and to make it a competent judge upon matters of fact.[5]

Both in the case of maintenance, and in the case of offences committed by or against jurors, the action of the Star Chamber really marks the transition between the mediæval and the modern law. We shall now see that it clearly marks the same transition in the case of an offence which was in the Middle Ages generally regarded merely as an offence against the administration of justice—the offence of Conspiracy.

### (*d*) *Conspiracy*.[6]

Stephen remarks that "conspiracy has much analogy to an attempt to commit a crime."[7] And we shall see that this analogy at this period comes out clearly enough in the manner in which it was treated by the court of Star Chamber.[8] But we have seen that, historically, conspiracy is more closely connected with offences against the administration of justice; and that it was almost exclusively from this point of view that it was treated by the mediæval common law.[9] The modern law on this subject really springs from these two diverse yet connected roots—Hudson could class together conspiracy and false

[1] Winfield, Present Law of Abuse of Legal Procedure 5-6.

[2] Hudson, op. cit. 91, citing 30 Ass. pl. 15.

[3] Hudson, op. cit. 91-93; Reportes del Cases 96, 243.

[4] Vol. iv 105-106, 163, 214. [5] Vol. i 343-344.

[6] On the whole subject see Winfield, Hist. of Conspiracy; cp. J. W. Bryan, The Development of the English Law of Conspiracy (Johns Hopkins University Studies).

[7] Stephen, H.C.L. ii 227. [8] Below 204.

[9] Vol. iii 401-407.

accusation.[1] But, when he was writing, this classification was ceasing to have the meaning which it once possessed, because conspiracies which had no reference to false accusations were being punished by the Star Chamber.

The Star Chamber assumed jurisdiction over all cases of conspiracy. Though Coke once maintained that a person acquitted on a criminal indictment must proceed, not by bill in the Star Chamber, but by the criminal procedure of the common law, Lord Ellesmere maintained that in this case, as in all others, the Star Chamber had jurisdiction;[2] and his view prevailed.[3] Moreover the Star Chamber punished false and malicious accusations made before itself,[4] or before the court of Chancery;[5] and it punished criminally conspiracies which would only have been the ground for an action upon the case at common law.[6] Further, it adopted the common law rule applicable to actions on the case for conspiracy, and punished a single accuser who had falsely and maliciously taken such proceedings.[7]

But it is clear that under these circumstances the element of conspiracy will tend to evaporate. The gist of the offence will be rather the malicious attempt to ruin another by a false charge than the conspiracy to effect this result. It was inevitable therefore, as Stephen has said,[8] that conspiracy should come to be regarded as a form of attempt to commit a wrong. It was so regarded in the sentence given in the Star Chamber against those who attempted to fight duels;[9] and in the *Poulterers' Case* it was ruled in the Star Chamber that the mere conspiracy, though nothing was executed, was an offence.[10] But, if a conspiracy is

[1] Op. cit. 104.

[2] Hudson, op. cit. 104; but the Star Chamber to a certain extent followed the law; thus if a man were indicted, no bill for conspiracy lay there before the indictment was traversed or otherwise avoided (1557) Gouldesborough 51 pl. 14; and if a man were convicted no bill lay there, Floyd v. Barker (1608) 12 Co. Rep. 23.

[3] Hudson, op. cit. 104-107; Miller v. Reignolds and Bassett (1614) Godbolt 205; Taylor v. Tolwyn (1629) Rushworth, Pt. II. vol. ii. App. 17; Stace v. Walker (1634) ibid 59.

[4] The Poulterers' Case (1611) 9 Co. Rep. at f. 57a; Amerideth's Case (1600) Moore K.B. 562 pl. 764, and Lord Gray's Case (1607) ibid 788 pl. 1088—both cases of a combination of copy-holders to prove that their lands were freehold or inheritable copyhold; Hersey's Case 12 Co. Rep. 103; Beverley v. Power, Rushworth op. cit. 2; Nicolas vii 77, 78, 101, 102; Dasent x 262; xi 348; xii 94, 95.

[5] Scrogs v. Peck and Gray (1600) Moore K.B. 562 pl. 765.

[6] Miller v. Reignolds and Basset (1614) Godbolt 205; Tailor and Towlin's Case (1629) ibid 444; Anthony Ashley's Case (1612) 12 Co. Rep. 90, 92; for the scope of the action on the case in the mediæval common law see vol. iii. 405-407.

[7] Hudson, op. cit. 106.

[8] H.C.L. ii 227.

[9] Above 200, 201.

[10] (1611) 9 Co. Rep. at f. 56b—"And it is true that a writ of conspiracy lies not, unless the party is indicted, and *legitimo modo acquietatus*, for so are the words of the writ; but that a false conspiracy betwixt divers persons shall be punished, although nothing be put in execution, is full and manifest in our books;" Hudson, op. cit. 105; Coke cites for this Fitz. Ab. *Briefe* pl. 926—Bellewe f. 80, cited vol. iii 406; for the development of the law as to the need for acquittal as a condition of taking criminal proceedings for conspiracy see Winfield, Present Law of Abuse of Legal Procedure 160-165.



so regarded, why restrict it to conspiracies to commit some offence in relation to legal proceedings? The Star Chamber acted upon this view; and just as it punished all kinds of attempts to commit wrongful acts,[1] so, a fortiori, it punished all kinds of conspiracies to commit the many varied offences punishable either by it or by the common law courts.[2] When the Star Chamber was abolished, the two divergent streams of doctrine which resulted from the mediæval precedents and the rules evolved in the Star Chamber, produced some very complex developments in the law of crime and tort.[3]

(*e*) *Libel and Slander.*

The modern law of defamation, like the modern law of conspiracy, has originated in two sets of doctrines originating in the common law courts and in the Star Chamber respectively. As in the case of conspiracy, I shall here only indicate briefly the nature of these two sets of doctrine. The manner in which, after the Restoration, they were combined by the judges of the common law courts, and transformed into our modern law, I shall relate in the second Part of this Book.[4]

*The common law.*—It was during this period that the common law definitely assumed jurisdiction over defamation by allowing a person who had been thus damaged to bring an action on the case.[5] But the ecclesiastical courts still continued to exercise a concurrent jurisdiction, if the scandal imputed was a matter which fell solely within their jurisdiction.[6] During this period a certain number of cases were brought before them;[7] and such cases occurred as late as the last decade of the

[1] Above 201.

[2] Coke affirmed that such conspiracies were punished both at common law and before the Star Chamber—"the usual commission of *oyer* and *terminer* gives power to the commissioners to enquire etc *de omnibus coadunationibus, confœderationibus, et falsis alligantiis* . . . in these cases, before the unlawful act executed, the law punishes the coadunation, confederacy or false alliance, to the end to prevent the unlawful act. . . . And in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it," 9 Co. Rep. at f. 56b; cp. S.C. Moore K.B. 813; and the same thing was laid down in the King's Bench in Bagg's Case (1616) 11 Co. Rep. at f. 98b; we have seen that Coke had some little authority for this view, vol. iii 406, and the tendency of the development of the action on the case was obviously in this direction; see vol. viii 381-382 for the development of this principle by the common law courts.

[3] Ibid. [4] Ibid § 2.

[5] For the earlier history see vol. iii 409-411.

[6] Ibid 411 n. 2; Eaton v. Ayloff (1629) Cro. Car. 111; Cucko v. Starre (1632) ibid 285; Osborne v. Poole (1698) 1 Ld. Raym. 236; Johnson v. Bewick (1702) ibid 711.

[7] For illustrations taken from Hale's Precedents of cases in the Ecclesiastical Courts see Carr, The English Law of Defamation, L.Q.R. xviii 270-272.

eighteenth century.[1] But Coke had laid it down that if the secular courts gave a remedy for any wrong, the jurisdiction of the ecclesiastical courts was thereby ousted, unless it was expressly saved;[2] and the principle was applied to actions for defamation in *Palmer v. Thorpe*.[3] No doubt the recognition of this principle was hastened by the fact that the ecclesiastical courts could not give damages.[4] At any rate it is clear that the jurisdiction of the ecclesiastical courts, even in this period, was fast coming to be limited to cases in which the defamation consisted of an imputation of some offence punishable in those courts.[5] The complete recognition of this principle, coupled with the abolition of the ex officio oath,[6] caused the jurisdiction of the ecclesiastical courts over defamation to become almost negligible.[7] But, as we have seen, it was not finally abolished till 1855.[8]

Throughout this period the popularity of the common law remedy was growing. Coke complained of the frequency of these actions;[9] and we shall see that, at the end of the period, a small book was devoted to summarizing the results of the cases.[10] With the characteristics of the law made by these cases I must deal later.[11] Here I need only draw attention to its most salient characteristic, and the consequences flowing therefrom.

The common law conceived of defamation simply as a civil wrong causing damage to the person defamed. Damage was the gist of the action. However insulting the words, no action lay unless the court could see that damage must ensue as a natural and probable result of the words spoken;[12] and the fact that the court, from its desire to discourage these actions, scrutinized the words and reasoned from them in the same way as they scrutinized and reasoned from the words of a writ or a pleading often produced some very absurd results.[13] From this conception of

[1] Crompton v. Butler (1790) 1 Hagg 460; Smith v. Watkins (1792) ibid 467.

[2] Co. Litt. 96b, cited vol. i 621.

[3] (1583) 4 Co. Rep. 20a—"If defamation touches or concerns anything determinable at the common law, the Ecclesiastical judge shall not have cognisance of it."

[4] "Although such defamation is merely spiritual, and only spiritual; yet he who is defamed cannot sue there for amends or damages, but the suit ought to be only for the punishment of the sin, *pro salute animæ*," ibid.

[5] Carr, loc. cit. 270-272; only one case is cited at p. 271, in which the words complained of imputed an offence punishable by the common law.

[6] Ibid 269, 270; vol. i 610-611.

[7] Carr, loc. cit. 272.

[8] 18, 19 Victoria c. 41; vol. i 620.

[9] "We will not give more favour unto actions upon the case for words than of necessity we ought to do where the words are not apparently scandalous, these actions being now too frequent," *per* Coke C.J. Crofts v. Brown (1617) 3 Buls. 167; cp. Stanhope and Blith's Case (1585) 4 Co. Rep. 15a, where Wray C.J. said that, "the judges had resolved that actions for scandals should not be maintained by any strained construction or argument, nor any favour given to support them, forasmuch as in these days they more abound than in times past."

[10] Below 393.

[11] Vol. viii 346-361.

[12] Ibid.

[13] Ibid.



the gist of the action three consequences followed. In the first place publication to some third person was essential, because otherwise no damage could have ensued;[1] and truth was a defence, because a person ought not to be allowed to receive compensation for damage caused to a character which he did not possess.[2] In the second place, being a personal action for a tort, it died with the person.[3] In the third place, the common law courts did not at this period recognize any difference between spoken and written defamation. It is true that the majority of cases were cases of spoken defamation; and the action is often called an action on the case for words. But we do get occasionally actions for written defamation, which are obviously treated by the court in exactly the same way as actions for words.[4]

Now it is clear that this treatment of the subject of defamation is wholly inadequate. It regards it simply from the point of view of the damage suffered by the injured person. But it is quite clear that defamation has also a bearing both upon the security, and upon the peace of the state. By a seditious libel upon the rulers of the state the security of the state—especially in a period of great political and religious change—may easily be imperilled. By a libel upon a private individual—especially if he be powerful and influential—the maintenance of the peace is even now endangered, and, in the sixteenth century, was very gravely imperilled. It is true that the legislation had shown some perception of these facts when they passed the statutes which created the offence of scandalum magnatum.[5] The offence was both of a civil and of a criminal character—the proceedings were taken by the prosecutor "tam pro Rege quam pro seipso."[6] But we have seen that these statutes were very seldom enforced;[7] and, as was not uncommon with these offences created by mediæval statutes, their civil tended to become more prominent than their criminal aspect.[8] The result was that, unless defamation was of

[1] Broughton's Case (1583) Moore K.B. at p. 142 *per* Walmsley J.; Edwards v. Wooton (1607) 12 Co. Rep. 35; Barrow v. Lewellin (1616) Hob. 62—"All actions of that kind [actions on the case] do suppose in auditu quamplurimorum propalavit etc."; below 210.

[2] Lord Cromwell's Case (1578-1581) 4 Co. Rep. 12b, 13b, 14a; below 210, 211-212.

[3] Vol. iii 576-579; below 211; cp. Hudson, op. cit. 103.

[4] See Broughton's Case (1583) Moore K.B. 141; cp. Buckley v. Wood (1592) 4 Co. Rep. 14b—that was a case of written defamation which was held not to be actionable; but clearly the court did not consider that the fact that it was written made any difference to the principles applicable; cp. Veeder, The History of Defamation, Essays, A.A.L.H. iii 458; Carr, English Law of Defamation L.Q.R. xviii 394.

[5] Vol. iii 409-410.

[6] Cromwell's Case (1578-1581) 4 Co. Rep. 12b.

[7] Vol. iii 409.

[8] Thus all the damages went to the injured party, Throgmorton v. Church (1720) 1 P. Wms. at p. 690; and, though the defendant could not justify because it was a *qui tam* action, Earl of Shrewsbury v. Sir Th. Stanhope (1595) Poph. at p. 69, he could explain the words in order to show that they were not defamatory, ibid;

the king or queen and punishable under special statutes relating thereto,[1] its criminal aspect was wholly neglected by the common law. This large gap in the criminal law was filled, and on the whole adequately filled, by the Star Chamber.

*The Star Chamber.*—From the first the Council and the Star Chamber recognized that, in the interests of the peace and security of the state, a strict control must be maintained over the printing, publication, and importation of books.[2] It followed from this that the Star Chamber, from an early date, assumed jurisdiction over all cases in which its rules as to the manner of publishing, and as to the matter published were infringed.[3] In some cases, indeed, its jurisdiction was strengthened by statute. I have already mentioned the statutes which dealt with libels against the king or queen, and with the publication of false and fantastical prophecies.[4] But the jurisdiction of the Star Chamber did not depend upon these statutes.[5] The court had assumed the power to deal with defamation in general on the ground that it disturbed the security or the peace of the state; and it is clear from Hudson's treatise, and from Coke's summary in the case *De Libellis Famosis*, that it had adopted and acted upon some of the principles of Roman Law.[6]

As Coke pointed out in the case *De Libellis Famosis*[7] the defamation with which the court dealt fell into two classes. It might be either of a magistrate or other public person, or it might be of a private person.

The first class of libels might be, and at this period generally were, directly dangerous to the security of the state. They incited to sedition. Thus we find a very large number of cases against persons who had traduced magistrates of all kinds, whether or not in relation to their judicial or their administrative work, and whether or not their offences could be classed as scandalum

Cromwell's Case 4 Co. Rep. at p. 14a. But the line between the special justification successfully pleaded in Cromwell's Case, which really amounted to the plea that the words were not defamatory, and a plea of justification in the ordinary sense, was not very clearly expressed, and perhaps caused Hudson, op. cit. 104, to adopt the mistaken view that truth was a defence to such an action.

[1] Vol. iv 511-512.

[2] Ibid 305-306; for the regulations of the Star Chamber and the later licensing Acts see vol. vi c. 7.

[3] Nicolas vii *xxxi* seqq.; Dasent i 120 (1543)—booksellers to return lists of books bought and sold within the last two years; ii 311, 312 (1549)—as to the recognizances to be given by printers; xiii 350, 399, 400 (1581-1582)—enquiry as to libels published in the University of Oxford, and the punishment of the offenders; xxiv 200, 222 (1593)—authorities of the City of London to enquire into libels upon foreign artificers; suspected persons ordered to be tortured to disclose accomplices.

[4] Vol. iv 511, 512.

[5] Les Reportes del Cases 39.

[6] Dig. 47.10 de injuriis et famosis libellis; see especially Dig. 47.10.5. 9-10, and 47.10.6.

[7] (1606) 5 Co. Rep. 125a.



magnatum.[1] "Let all men," it was said in the Star Chamber, "take heede how they complayne in wordes against any magistrate, for they are gods."[2] In fact all libels of this kind were regarded as a "scandal of the government;" "for what greater scandal of government can there be than to have corrupt or wicked magistrates to be appointed and constituted by the king to govern his subjects under him."[3] Thus it was laid down that "any private delivery or writing of a libel is a great offence: yea, to see, hear it, or report it."[4] It was therefore "a perylouse thinge to keepe a lybelle especiallye yf it touche the state;" and, "if it be a magistrate or a publicke offycer to whome the same is delyvered, he oughte to examyne the matter and (if it be in his power) to punishe the same: otherwyse w^th^ all possible speed to acquaynte the lordes of the kinges Councell w^th^ all, and not to conceale the same, or to doe nothinge aboute the same."[5] It is clear that these doctrines very materially contributed to the safety of the state in the troublous times of the sixteenth century. But it is equally clear that when, in the seventeenth century, the nation was divided into the two hostile parties of those who favoured the prerogative and those who favoured the Parliament, and when these doctrines were applied by the court of Star Chamber to uphold the prerogative, their rigid application did more than anything else to substitute, for the reverence felt for the court in the Tudor period, those feelings of fear and hatred, which led to its abolition when Parliament got the victory in 1641.

The second class of libels—libels against private persons—was punished on the ground that they tended to provoke breaches of the peace. "For although the libel be made against one, yet it incites all those of the same family, kindred, or society to revenge, and so tends *per consequens* to quarrels and breach of the peace, and may be the cause of shedding of blood."[6] Indeed it was

[1] Hudson, op. cit. 101-102; Nicolas vii 306 (1542)—groundless accusation against the President and Council of Wales; South v. Ward (1631) Rushworth, Pt. II. vol. ii App. 31—slandering a Justice of the Peace; Atty.-Gen. v. Jones, ibid—libelling a master in Chancery; Atty.-Gen. v. Fowlis (1634), ibid 65, 66—slandering Lord Wentworth and the Council of the North; Smith v. Crokew and Wright (1632) Cases in the Star Chamber (C.S.) 38-40—writing and publishing a libel on a plaintiff in Chancery and on the court of Chancery.

[2] Les Reportes del Cases 176-177.

[3] 5 Co. Rep. at f. 125a.

[4] Les Reportes del Cases 225.

[5] Ibid 372-373; "if one finds a libel (and would keep himself out of danger), if it be composed against a private man, the finder either may burn it, or presently deliver it to a magistrate; but if it concerns a magistrate or other public person, the finder ought presently to deliver it to a magistrate, to the intent that by examination and industry, the author may be found out and punished," De Libellis Famosis, 4 Co. Rep. at f. 125b; Richardson C.J. laid down a similar rule in 1632, Cases in the Star Chamber (C.S.) at pp. 151-152.

[6] De Libellis Famosis, 5 Co. Rep. at f. 125a; in 1607 it was resolved in the case of Edwards v. Wooton by the judges and the court of Star Chamber that, "yf a

clearly necessary for the Star Chamber thus to punish libels against private persons, if it was to succeed in its attempt to put down duelling.[1] Unless some sort of adequate redress was provided for provocative insults, its ordinances against duelling were bound to be a dead letter.

It followed from the view which the Star Chamber entertained of the nature of the offence of libel that it differed very considerably from the nature of the offence which was redressible by a common law action for damages. In the first place truth was no defence. "In a settled state of Government the party grieved ought to complain for every injury done him in an ordinary course of law, and not by any means to revenge himself, either by the odious course of libelling or otherwise."[2] Further, the fact that it was true might make it more likely to result in a breach of the peace—"for as the woman said she would never grieve to have been told of her red nose if she had not one indeed."[3] In the second place, the fact that it was not published was no defence.[4] Hudson tells us that the "precedents are infinite" for punishing those who have sent scurrilous letters to other persons.[5] And it should be noted that the writer and contriver, and, if it was published, the publisher could be punished.[6] What amounted to publication was perhaps not quite clear at this period. Coke and Hudson lay down the law in different ways; but Coke's view that there must be some active repetition to others, and that merely hearing it or copying it without divulging it to others, is not publication, has prevailed.[7]

man will wryte a pryvate letter defamatorye and not otheryse publishe yt eyther before or after the wrytinge, he shall not have an action of the case; but forasmuche as the same dothe provoke malice and breache of the peace and revenge yt shalbe punished in this Courte, and nippe it *dum seges in herba;* for being a letter onelye kepte cloase yt gyuethe no cause of accion because he hathe no dammages. And this beinge an offence that dothe provoke revenge, bringe daunger to the state and common weale *et interest reipublicæ*, and therefore an offence in this Cowrte to be severelye punished," Les Reportes del Cases 344; S.C. 12 Co. Rep. 35.

[1] Above 200-201; Hudson, op. cit. 103; Bacon's argument in the case of Priest and Wright, Spedding, Letters and Life of Bacon iv 406; Carr, L.Q.R. xviii 391; cp. Bl. Comm. iv 150.

[2] De Libellis Famosis (1606), 5 Co. Rep. at f. 125b; Hudson, op. cit. 102-103.

[3] Ibid 103. [4] Edwards v. Wooton, 12 Co. Rep. 35; above 209 n. 6.

[5] Hudson, op. cit. 101.

[6] Lamb's case (1611) 9 Co. Rep. 59b. "It was resolved, that everyone who shall be convicted in the said case, either ought to be a contriver of the libel, or a procurer of the contriving of it, or a malicious publisher of it, knowing it to be a libel."

[7] Coke said in Lamb's case, "If one reads a libel that is no publication of it, or if he hears it read it is no publication of it, for before he reads or hears it, he cannot know it to be a libel; or if he hears or reads it, and laughs at it, it is no publication of it; but if after he has read or heard it, he repeats it or any part of it in the hearing of others, or after that he knows it to be a libel, he reads it to others, that it is an unlawful publication of it; or if he writes a copy of it, and does not publish it to others, it is no publication of the libel. . . . But it is great evidence that he published it, when he, knowing it to be a libel, writes a copy of it;" on the other hand Hudson, op. cit. 102, said—"To hear it sung or read, and to laugh at it, and to make merriment with it, hath ever been held a publication in law."



In the third place the fact that the person libelled was dead was no bar to a prosecution. "A libelle," it was said by Coke in the court of Star Chamber,[1] is a breach of the peace, and is not to be suffered but punished—this is as poison in the Commonwealth, and no difference of the deade or lyvinge: and th' offence to the state dyes not."

In one respect the different views which the Star Chamber and the common law courts took of this offence led them to a similar result. In the Star Chamber, as in the common law courts, spoken words seem to have been treated in the same way as written words. Coke, it is true, in the case *De Libellis Famosis*, seems to lay it down that the libel, if not in writing, must be contained in either pictures or signs, i.e. either by painting, or by fixing a gallows or other ignominious signs at a person's door. But he does not say that it could not be contained in words; and it is clear from other cases that the Star Chamber punished defamatory words no less than defamatory writings.[2] Coke is silent as to the treatment by the Star Chamber of defamatory words. But Hudson draws a distinction, which, as we shall see, may have had some importance in the making of our modern law. If, he says, the defamation is written, the manner of defaming is in itself an offence and punishable. If, on the other hand, it is spoken it may be justified by proving that it is true.[3] In other words defamatory words will be treated rather as a tort than a crime. It is clear that this is not quite consistent with the practice of the court in punishing spoken words as a crime; but probably Hudson was thinking of defamatory words which were not seditious; and, if so, it is possible that Hudson's distinction is one of the roots of the modern distinction between libel and slander.[4] And, though the law as stated by Hudson is somewhat inconsistent, he may have represented truly enough an inconsistency in the practice of the court. If the court had been quite logical it would have treated defamation as a crime merely, and left a person who wanted damages to his action at common law. Indeed we do

[1] Les Reportes del Cases 226.

[2] "A libell may be in word as well as in writing," *per* Richardson C.J., Dalton v. Heydon and others (1632) Cases in the Star Chamber (C.S.) 71; Hudson, op. cit. 102; Atty.-Gen. v. Chambers (1630) Rushworth, Pt. II. vol. ii App. 21; Atty.-Gen. v. Ewer (1632) ibid 36.

[3] Op. cit. 104—"And I desire to observe one difference, which standeth with the rules of law and reason, which, under favour, I have ever conceived to be just, that upon the speaking of words, although they be against a great person, the defendant may justify them as true. . . . But if he put the scandal in writing, it is then past any justification, for then the manner is examinable and not the matter;" this would hardly, as the illustration shows, apply to seditious words; in later law such words were and are criminal, vol. viii 339-340. [4] Hudson, op. cit. 104.

get a dictum that the Star Chamber never gave damages.[1] But it is quite clear that in cases of defamation the court did give damages to the plaintiff, both in cases of defamation and other cases, as well as punishing the defendant.[2] We shall see that these inconsistencies in the practice of the Star Chamber, and the fact that the common law courts, in the latter part of the seventeenth century, constructed our modern law on the basis, both of the common law action on the case and of the doctrines laid down in the Star Chamber, go far to explain its illogical and inconvenient form at the present day.[3]

### (*f*) *Fraud.*

One of the most salutary kinds of jurisdiction exercised by the Council and Star Chamber was that exercised in all cases of fraud. We have already seen that the Star Chamber set an example to the common law courts in the application and interpretation of the statutes of 1571 and 1584-1585, which were passed to prevent frauds upon creditors and purchasers.[4] We shall see also that both Council and Star Chamber took a great part in the administration of the earlier bankruptcy legislation which is closely connected with these statutes.[5] But, beyond this, both exercised a general jurisdiction in all cases of fraud. Thus we get a number of cases in which they interfered to prevent a fraudulent use of the technical proceedings of the common law courts.[6] Hudson thought that the Star Chamber could cause a judgment to be vacated if fraud were proved.[7] And it is clear, both from his book[8] and from Hawarde's reports,[9] that the court was specially ready to interfere where advantage had been taken of youthful inexperience. Then, too, there are a number of cases in which both Council and Star Chamber interfered to check frauds in connection with

[1] "This Courte never gyves any damage, but onelye Costes," Les Reportes del Cases 247.

[2] In Frize v. Bennet (1627) Rushworth, Pt. II. ii vol. ii App. 6, it is expressly stated that the Court, though it fined the defendant, would give no damages to the plaintiff, because he himself repeated the libel, and was not of a good character; Thelwel v. Holman (1628) ibid 12-13—£500 damages given; Atty.-Gen. v. Ewer (1632) ibid 36; Falkland v. Mountmorris (1632) Cases in the Star Chamber (C.S.) 1-37.

[3] Vol. viii 361-367. [4] Vol. iv 480-482. [5] Vol. viii 233, 236, 238.

[6] Les Reportes del Cases 59, 60, 70; Dasent xv 47, 84-85, 195 (1587); Sheldon v. Sheldon (1635) Rushworth, Pt. II. vol. ii App. 71; vol. i 505. [7] Op. cit. 99.

[8] Ibid 99; "the inveigling of young gentlemen, and entangling of them in contracts of marriage to their utter ruin," ibid 110; "If subtle merchants or tradesmen will draw young gentlemen under age before a judge, or any other which hath power to take a fine or recognizance, knowing him to be under age, he shall be grievously fined. . . . Yea the drawing of young gentlemen into security for commodities of tobacco and phillizellas, and such unnecessary stuffs, which they are compelled forthwith to sell away to brokers at half the value is usually fined," ibid 111.

[9] At pp. 47, 48.



conveyances.[1] In 1628 the Star Chamber declared,[2] "that if any man do make conveyances of his land, or acknowledge Statutes or Recognizances or suffer judgments, whether the same be upon just and good considerations or without, and concealing the same do afterwards for valuable considerations convey the same lands to other persons, as though the same were free from any manner of incumbrance; such double and unjust dealing is a notorious fraud and deceit against the law of the realm, and fit for the censure of this court; and albeit such former conveyances and incumbrances, if they be upon good consideration and *bona fide*, cannot be avoided; yet this court will upon complaint punish the offenders and their confederates by imprisonment, fine and damages to the party grieved, to the full of his loss and hinderances, and otherwise, as the cause shall require." Similarly the Council interfered in cases in which contracts had been induced by fraud;[3] and the Star Chamber punished manufacturers who deceived the public by their methods of manufacture.[4] We shall see that in the exercise of this branch of jurisdiction both the Council and the Star Chamber were seconded by the equitable jurisdiction of the Chancellor.[5] All these courts by their example helped to induce the common lawyers to develop the common law remedies for fraud, and ultimately to produce some changes in the principles of civil liability.[6]

### (*g*) *Acts contrary to public policy.*

We have seen that the Star Chamber possessed an indefinite power to suppress "errors creeping into the Commonwealth, which otherwise might prove dangerous and infectious diseases . . . although no positive law or continued custom of common law giveth warrant to it."[7] Just as the king through the Council had an indefinite power by proclamation or otherwise to make rules or forbid acts which he deemed to be contrary to public policy,[8] so the Star Chamber assumed an indefinite power to punish the breach of these rules or the doing of these acts. I have already said something of the manner in which it interfered as between landlord and copyholder

[1] Dasent xiv 29 (1585-1586), 313, 330, 347 (1586-1587); xxii 414 (1592).

[2] Titoe v. Newdike (1628) Rushworth, Pt. II. vol. ii App. 9.

[3] Dasent xx 100, 101 (1590)—a jeweller had sold goods worth £20 for £185; cp. ibid xxii 116 (1591)—fraud practised on a youthful surety.

[4] Case of the Hatband makers (1632), Cases in the Star Chamber (C.S.) 115-116—they had made their hat-bands of copper and other base metals, and sold them for good silver and gold bands; "and because fraude is a common hurt to the weale publique and that, in all manufactures, from the great commodity cloath to the meanest, fraud is too much used, tendinge to the distruction of the whole trade of the kingdome, for example sake it was ordered that this Decree should be carefullie drawen up, and to be read at the next generall meetinge of the Liveries of every Companie in London, and the Guyldhall."

[5] Below 292, 328-329. [6] Vol. viii 426.

[7] Hudson, op. cit. 107; vol. i 504. [8] Vol. iv 99-104, 296-297; below 433.

to secure the copyholder against oppression.[1] Its interferences as between employer and workman,[2] its regulation of the course of trade,[3] and its control of all courts and bodies and persons exercising governmental functions,[4] rested upon the same principle of paramount public policy. Further, it even assumed a power to deal with cases already dealt with by other courts.[5] "In a word, there is no offence punishable by any law, but if the court find it to grow in the Commonwealth, this court may lawfully punish it, except only where life is questioned."[6]

A large discretionary power of this kind could be exercised with general applause when the peace and security of the state were in danger. Lambard says,[7] "Is it not meet and just, that when the wicked sort of men have excogitated anything with great labour of wit and cunning, so as it may seeme they have drawne a quintessence of mischief, and set the same abroach to the remedilesse hurt of the good and quiet subject; Is it not meet and just (I say) that authority it selfe also . . . should straine the line of justice beyond the ordinary length and wonted measure, and thereby to take exquisite avengement upon them for it? Yea is it not right necessary that the most godly, honourable, wise, and learned persons of the land should be appealed unto, that they may apply new remedies for these new diseases?" But such a power was certain to arouse unpopularity when, the peace and security of the state having been assured, men began to question the meetness and justness of its exercise; and when the court replied to these questionings by asserting a larger measure of the power which was questioned.

The most important work of the Star Chamber was the exercise of this criminal or quasi-criminal jurisdiction. It is its work in this direction which has had a permanent influence upon the development of the English law of crime and tort. But all through this period both the Council and the Star Chamber interfered in civil cases. In fact, just as the court of Chancery only gradually ceased to exercise a semi-criminal jurisdiction, ancillary to its general equitable jurisdiction,[8] so the Council and Star Chamber only gradually ceased to exercise a general civil jurisdiction ancillary to their criminal jurisdiction. But it was only in so far as the work of the Council and Star Chamber in this direction was adopted by the Chancellor, and became part of the system of equity administered by him, that it has had a permanent influence upon the development of English law. Therefore its history naturally falls to be related under that head.

[1] Vol. iii 210-211. [2] Vol. iv. 380-381, 385-386. [3] Ibid 335-338.
[4] Ibid 77-80, 85-87. [5] Hudson, op. cit. 115-119. [6] Ibid 117-118.
[7] Archeion, 98-99. [8] Vol. i 406; below 289, 300.



## II

### The Equitable Jurisdiction of the Chancellor

Continuity is the characteristic feature of the history of the common law. An absence of continuity is the characteristic feature of the early history of equity. No doubt the root idea of equity, the idea that law should be administered fairly and that hard cases should so far as possible be avoided, is common to many systems of law at all stages of their development;[1] and this root idea came very naturally to the mediaeval mind, which regarded the establishment of justice, through or even in spite of the law, as the ideal to be aimed at by all rulers and princes.[2] In England the mediæval history of the application of this ideal to the law passed through two distinct stages. There is the stage in which it was applied in and through the common law courts, and there is the stage in which it was applied in and through the Council and the chancellor.

The first stage ended, as we have seen,[3] in the course of the first half of the fourteenth century. In the latter half of the fourteenth and in the fifteenth centuries the common law tended to become a fixed and a rigid system. It tended to be less closely connected with the king, and therefore less connected with, and sometimes even opposed to, the exercise of that royal discretion which was at the base of the equitable modification of the law.[4] Equity therefore came to be exercised by the chancellor and Council who were in close touch with the king, because through them the king exercised his executive and extraordinary judicial power.

This second stage in the history of Equity differs in three important respects from the preceding stage. In the first place, its growth was caused, and its development was largely conditioned, by the rigidity which had naturally become a marked characteristic of the common law, when it ceased to develop those equitable principles and ideas which it possessed at an earlier period. The defective state of the common law, both substantive and adjective, and the disturbed state of the country, which not only rendered its cumbersome procedure useless but even enabled litigants to abuse it to promote injustice, gave rise to a need for the growth of a set of equitable principles outside of and even opposed to the common law.[5] In the second place, being thus developed outside

[1] Cp. Pollock, The Transformation of Equity, Essays in Legal History (1913), 287-289.
[2] Vol. ii 131-132. [3] Ibid 344-345.
[4] Ibid 346; vol. i 210-211. [5] Ibid 405-406; vol. ii 414-416.

the sphere of the common law and mainly by ecclesiastical chancellors, its interference with the common law was more direct and avowed than it would have been if it had been developed in and through the common law courts.[1] In the third place, the theory upon which the equity of these ecclesiastical chancellors was based, was somewhat different from the theory upon which the equity described by Bracton, and administered by the common lawyers of the thirteenth and early fourteenth centuries,[2] rested. But this third difference needs a few words of explanation.

The common lawyers of the thirteenth and early fourteenth centuries used the term 'equity' in a wide sense, and included under it such ideas as abstract justice and analogy. The ecclesiastical chancellors, on the other hand, based their equity on the more restricted idea that the court ought to compel each individual litigant to fulfil all the duties which reason and conscience would dictate to a person in his situation.[3] Reason and conscience must decide how and when the injustice caused by the generality of the rules of law was to be cured. They were the executive agents in the work of applying to each individual case those dictates of the law of God and nature upon which the ecclesiastical chancellors considered equity to rest. As we have seen, therefore, their equitable jurisdiction was based on an application of the current ideas of the canonists of the fifteenth century regarding the moral government of the universe to the administration of the law of the state.[4] The law of God or of nature or of reason must be obeyed; and these laws required, and, through the agency of conscience, enabled abstract justice to be done in each individual case, even at the cost of dispensing (if necessary) with the law of the state. How far it could interfere with the law of the state was to be determined by drawing distinctions, in the light of this theory, between the various provisions of the laws which governed the state.[5] Naturally equity administered on these lines was "loose and liberal, large and vague." But the popularity of the equity administered by the chancellor on these lines was so great that, in the latter part of the fifteenth and in the sixteenth centuries, we begin to see the growth of a separate

[1] Vol. ii 346-347. [2] Ibid 245-249, 334-345.

[3] Sir Paul Vinogradoff, Reason and Conscience in Sixteenth Century Jurisprudence, L.Q.R. xxiv 379, says—"In the thirteenth and fourteenth centuries, in the period of the early predominance of the common law, equity, though specifically recognized and sometimes applied in practice, was taken in a wider sense, including justice and analogy;" on the other hand it is clear from St. Germain's Doctor and Student, below 266-269, that the ecclesiastical chancellors were guided by a different principle; St. Germain "formulates distinctly the proposition that equity excepts from the law on grounds supplied by reason and conscience, and it is on the strength of conscience that remedies in equity were commonly granted."

[4] Vol. iv 276, 279-281. [5] Ibid 281-282.



court of Chancery, with its own staff of officials and its own peculiar procedure.[1] Naturally this separation caused the growth of friction between this new court and the common law courts; and the literature of the period shows that this friction had become acute in the first quarter of the sixteenth century.[2]

This second stage in the history of equity ends with the beginning of the Reformation in Henry VIII.'s reign. One of the indirect results of that movement was the beginning of a third stage, in which the ecclesiastical chancellors of the preceding period gradually gave place to English lawyers.[3] Fortunately, however, the principles upon which the ecclesiastical chancellors had acted had been summarized and rendered intelligible to English lawyers by St. Germain's Dialogue[4] between the Doctor and the Student; and thus a greater degree of continuity between the second and third stages was secured than would otherwise have been possible. At the same time, the fact that English lawyers, educated at the Inns of Court, presided over the Chancery, tended to keep the equity administered by the court of Chancery in close touch with the development of the common law, and to improve the relations between common law and equity. At any rate an open conflict was avoided. But the root of the earlier differences was still present, and, at the beginning of the seventeenth century, the old conflict broke out with renewed vigour in the dispute between Coke and Lord Ellesmere. James I. settled it in favour of the court of Chancery; with the result that from henceforth the court of Chancery was a court of equal, and in some respects of superior authority, to the courts of common law.[5]

These developments introduce us to a fourth stage in the history of equity. Equity tended to become less a principle or a set of principles which assisted, or supplemented, or even set aside the law in order that justice might be done in individual cases, and more a settled system of rules which supplemented the law in certain cases and in certain defined ways. We can see the beginnings of this change in the first half of the seventeenth century. But, during this period, its progress was hindered by the victory of the Parliament, because Parliament suspected the equity administered by a chancellor in intimate relations with the king.[6]

[1] Vol. i 400-409. [2] Ibid 459-460.

[3] Below 220, 222-223. [4] For this book see below 266-269.

[5] Vol. i 461-463; below 236-238.

[6] Vol. i 463-465, as Sir F. Pollock says, Transformation of Equity, Essays in Legal History (1913), 294-295, "the chancellor was still eminently the king's minister; his jurisdiction was practically uncontrolled, for there was no appellate court; and men saw in the chancellor's discretion, as they had seen in the criminal equity of the Star Chamber, a power of being abused to political ends. Here, and not in any merely technical prejudices, is the explanation of Selden's famous gibe 'Equity is a roguish thing.' It is so because the measure of the chancellor's foot

Thus, although we can see the origins of some of our later equitable rules, they are, as yet, very rudimentary. We must wait till the latter half of the seventeenth century for marked progress in this process of transformation. It is not till then that the lineaments of our modern system of equity begin to emerge with any distinctness.

I have dealt in an earlier volume with the earliest stage in the history of equity. In this chapter I shall say something of the second, the third, and the beginning of the fourth stages, under the following heads:—The Chancellors and other Officials of the Court; the Literature of and the Authorities for the early Rules of Equity; the Subject-matter of these Rules; and, the Evolution of the Character of Equity.

### *The Chancellors and other Officials of the Court*

The chancellors have always been more than mere lawyers. Though, in the mediæval period, their character of statesman generally predominated, by the end of this period they were as much, if not more noted, as lawyers than as statesmen. To write the biographies of all the chancellors would be both tedious and unnecessary. It is still less necessary even to enumerate the series of masters of the rolls and the other masters of the court, who, by the part which they took in settling the practice of the court, contributed in no small degree to the creation of fixed principles governing the administration of equitable relief. It will be sufficient to illustrate from the lives of some of the more distinguished chancellors and their officials the gradual growth of fixity and system in the administration of equity, and the nature of the influences which helped to shape the contents of its rules.

We have seen that, with very few exceptions, the mediæval chancellors were ecclesiastics and statesmen.[1] All the chancellors of Henry VII.'s reign—Alcock, bishop of Worcester, Cardinal Morton, Archbishop of Canterbury, Dene, Archbishop of Canterbury, Warham, Archbishop of Canterbury—were of the mediæval type. Warham's successor was Cardinal Wolsey; and, if we except Bishop Goodrich, the last of Edward VI.'s chancellors, and Bishop Gardiner and Archbishop Heath, Mary's chancellors, he was the last of the chancellors of this type. More, his successor, was the first of the lawyer chancellors of the modern type. As we might expect, the practice of appointing lawyers as chancellors did not become fixed immediately. There was a period of hesitation; but it is clear that by the middle of the

may go too near to follow the measure of King Charles I.'s foot, peradventure even Archbishop Laud's."

[1] Vol. ii 557-558.



seventeenth century the new type of chancellor had superseded the old. In fact the development of the equitable jurisdiction of the chancellor necessitated the change. But it is not improbable that the suddenness of the change from a chancellor of the type of Wolsey to a chancellor of the type of More was due partly to political and religious considerations.

It is fairly clear that Wolsey made use of his position as the chief minister of the state to increase the jurisdiction of his court, and to settle it finally as a court of equity, quite distinct from the Council or the Star Chamber.[1] It is clear too that he held very large notions as to the principles upon which equitable interference with the law was justifiable. "The king," he is reported to have said,[2] "ought of his royal dignity and prerogative to mitigate the rigour of the law, where conscience hath the most force; therefore, in his royal place of equal justice, he hath constitute a chancellor, an officer to execute justice with clemency, where conscience is opposed by the rigour of the law. And therefore the Court of Chancery hath been heretofore commonly called the Court of Conscience; because it hath jurisdiction to command the high ministers of the common law to spare execution and judgment, when conscience hath most effect." It is also fairly certain that Wolsey acted upon these principles, with very little regard for the professional feelings of the common lawyers.[3] But we have seen that the common lawyers had already begun to protest against the encroachments of the Chancery.[4] It is not surprising, therefore, to find that, on Wolsey's fall, the grievances of the common lawyers found a place in the articles drawn by the Council against Wolsey.[5] Complaints were made of his encroachments upon the jurisdiction of the common law courts,[6] and upon his contemptuous treatment of some of the judges.[7] We have seen that the common lawyers were an influential element in the House of

[1] "He would repair unto the Chancery, sitting there till eleven of the clock, hearing suitors and determining divers matters, and from thence he would divers times go into the Star Chamber as occasion did serve," Cavendish, Life of Wolsey 40.

[2] Ibid 167.

[3] Below nn. 6 and 7.

[4] Vol. i 459-460.

[5] Coke, Fourth Instit. 89-95.

[6] "Also the said Lord Cardinal hath granted many injunctions by writ, and the parties never called thereunto, nor bill put in against them: and by reason thereof, divers of your subjects have been put from their lawful possession of their lands and tenements. And by such means he hath brought the more party (*sc.*) of the suiters of this your realm before himself," art. 21, Fourth Instit. 92.

[7] "Also when matters have been near at judgment by proces at your common law, the same Lord Cardinal hath not only given and sent injunctions to the parties, but also sent for your judges and expressly by threats commanding them to defer the judgment, to the evident subversion of your laws, if the judges would so have ceased," art. 26, ibid; cp. art. 31—a specific charge of rebuking Fitzherbert because, at the session of oyer and terminer at York, held before him, bills for extortion against the Ordinaries were found.

Commons,[1] whose support for his matrimonial and ecclesiastical policy it was important for the king to gain. It was perhaps to conciliate this element that Henry VIII. made a new departure, and appointed as Wolsey's successor Sir Thomas More—an eminent common lawyer, and the son of a common law judge.

That these were Henry's motives is of course a matter merely of conjecture. But, in support of this conjecture, we may remember, firstly, that at a later period Henry was obliged to conciliate the common lawyers in order to pass the Statute of Uses through the House of Commons;[2] and, secondly, that the intimate and somewhat delicate relations, which existed at the latter part of the mediæval period between the chancellor and the common law judges, could not be maintained in the face of Wolsey's high handed methods. The nature of these relations between the common law and equity, and the difficulty and necessity of maintaining them, can best be seen from the cases of the latter part of the fifteenth century which are reported in the Year Books.

It had been recognized, at least from the middle of the fifteenth century, that the relations of law and equity were so close that the united efforts of the chancellor and the common lawyers were needed to settle them satisfactorily. We have seen that the closeness of their relations necessarily followed from the theory which underlay the administration of equity.[3] If the law was to be departed from on the ground of conscience or abstract justice, it is clear that the provisions of the law, which it was alleged worked some hardship, must be very carefully examined. The Year Books, from Henry VI.'s reign onwards, show us that in doubtful cases the chancellors were willing to hear a legal argument as to the justice or expediency of the application of equity to any particular case. Let us look at one or two illustrations.

In 1459[4] it appeared that one J. had bought from J.R. certain debts due to him (J.R.); and that he (J.) had promised under seal to pay the price. But as the debts were choses in action and not transferrable, J. had got no *quid pro quo* for his promise to pay. As, however, the promise was under seal, J. was liable on it at common law. He therefore applied to the chancellor. The chancellor adjourned the matter into the Exchequer Chamber that it might be discussed by the judges of both benches. They agreed that as J. had got nothing he ought in equity to be released; and J.R. was committed to the Fleet

[1] Vol. iv 174, 189; cp. vol. ii 430-434.
[2] Vol. iv 453-455, 461.
[3] Ibid 280-281.
[4] Y.B. 37 Hy. VI. Hil. pl. 3.



till he cancelled the bond. Nevertheless J.R. not only did not cancel the bond but sued upon it at common law. The chancellor issued an injunction; and an inconclusive argument took place as to the effect of the proceedings in Chancery and the issue of the injunction. The opinion of Prisot seems to have been that the proceedings in Chancery were not a good defence, and that therefore the injunction should be disregarded.[1] The case shows both that the judges were willing to help the chancellor to settle questions as to the advisability of equitable interferences with the law, and that they were jealous of any attempt to interfere with the regular course and effect of their own procedure.

We see the same willingness of the chancellor to consult the judges, and the same jealousy of any interference with the sanctity of common law process in a case of the year 1483.[2] The report runs as follows: "In the Exchequer Chamber before all the judges of the one bench and the other, several serjeants and apprentices being also present, the Archbishop of York, then chancellor of England, asked the advice of the judges as to the grant of a subpœna. And he said that complaint was made to him that one was bound by a statute merchant to another, and that the recognisor had paid the money and had no release; and that, notwithstanding these facts, the recognisee sued execution; and he said further that the recognisee would not deny, if he was examined, that he had been paid. . . . How say you then, My Lords, ought I to grant a subpœna?" To which Fairfax replied that, "it was against all reason to grant a subpœna, since it would mean that two witnesses might then defeat a record; since, when a man is bound in that form, he is not bound to pay without acquittance or release . . . so that it is his folly if he pays without;" and with this view of the law Hussey agreed. The chancellor, on the other hand, said that it was the common practice of the court to grant a subpœna in such a case. But, apparently, in the end he fell in with the views of Fairfax and Hussey and refused to grant it.[3]

We see the same kind of consultation and argument in two cases of 1468 and 1479 relating to married women;[4] and much

[1] Y.B. 37 Hy. VI. Hil. pl. 3 (p. 14)—"Quand le fait est bon et tout temps ad este, lour examinacion ne fera ceo mauveis, mes lour examinacion ne prove le fait bon et loyal en nostre Ley: et pur tant que il ne poit avoir remedy per nostre Ley, il suira la pur estre restore al obligacion; et cest l'effect de lour pouvoir et lour judgement, a restorer la party al obligation, ou a faire la party a faire acquit, ou release, ou a executer, ceo ne poit la court la rien faire, sinon commander luy al prison, etre la tanque il veut ce faire: et issint cest tout que le dit Court poit faire."
[2] Y.B. 22 Ed. IV. Pasch. pl. 18.
[3] "Et puis le Chancellor agree al statute merchant, pour ce que il fuit matter de recorde."
[4] Y.BB. 7 Ed. IV. Trin. pl. 8; 18 Ed. IV. Mich. pl. 4; for these cases see vol. iv 429.

the same relations existed in Henry VII.'s reign. In 1489[1] the chancellor consulted the judges as to the effect of a release of a debt by one of two co-executors, whereby the assets were so diminished that the testator's will could not be carried out. The judges thought that nothing could be done at law, as each executor had full power to deal with the assets; but that there might be a remedy in equity.[2] The chancellor agreed that it was a case for equitable interference. "Every law," he said, "should be in accordance with the law of God; and I know well that an executor who fraudulently misapplies the goods and does not make restitution, will be damned in Hell, and to remedy this is, as I understand it, in accordance with conscience." So in 1492[3] the chancellor (apparently with the agreement of the judges) ruled, contrary to his opinion in 1483,[4] that an obligor who had paid, and had taken no acquittance, could get relief in Chancery.[5]

If there is any truth in the charges made against Wolsey, it is clear that his high-handed proceedings had upset this working arrangement between the Chancery and the common lawyers. The lawyers naturally desired a reversion to the old state of things; and, as the lawyers were an important party in the House of Commons, they secured not only a reversion to the old state of things but something more valuable. They got in Sir Thomas More a chancellor who had been educated as a common lawyer; and his appointment on that account marks an important turning point in the history of equity. It marks the transition from the administration of equity by ecclesiastics and canonists to its administration by laymen and common lawyers. In the earlier period the ecclesiastical training of the chancellors had led to the infiltration of ideas of the canon law.[6] But now the legal training of the chancellors was to lead to the infiltration of ideas of the common law. The occasion for the transition was political; and both political and religious causes made it permanent. The underlying assumptions of the canon law were opposed to the new ecclesiastical policy which the king was meditating; and its study was a few years later prohibited.[7] The common lawyers

[1] Y.B. 4 Henry VII. Hil. pl. 8.

[2] "La Ley de la terre est pur moults choses, et moults choses sont etre sues icy que ne sont remediables a le Common Ley, et assez sont en conscience parentre un homme et son confesseur, et issint est cest chose," *per* Fineux.

[3] Y.B. 7 Hy. VII. Pasch. pl. 2.

[4] Above 221 n. 3.

[5] See the opinions of Hussey and Brian at f. 12a; the chancellor, answering the argument that, because there is no remedy at common law, therefore there is no claim for equitable relief, says—"Et issint si on paye un duty d'un obligation et n'ad escript, ceo est bon conscience; et uncore al Comon Ley nul barre."

[6] Vol. iv 275-276; above 216; below 267-269.

[7] Vol. i 592; vol. iv 228, 232.



were able to exert pressure upon a king who had need of the support of Parliament. That pressure affected the whole future development of equity, just as the same pressure, a few years later, affected the whole future development of the land law, because it shaped the statute of Uses in such a way that the common law courts got control over the most important variety of uses.[1]

More's beautiful character would have made him an ideal chancellor at any time. It was exactly fitted to the difficult position which he was then called upon to fill. He was scrupulously pure,[2] and strictly impartial, to the disappointment, on two occasions, of his relations.[3] He is said to have quickly cleared off all arrears of business.[4] He was easy of access, and made it a habit never to grant a subpœna till he was satisfied that the plaintiff had some real ground of complaint.[5] The result was that the number of injunctions granted considerably diminished. And, when he heard that some of the judges were still complaining of their issue, he invited them to dinner, "and after dinner when he had broken with them what complaints he had heard of his injunctions, and moreover showed them both the number and causes of every one of these in order so plainly, that upon full debating of those matters, they were all enforced to confess, that they in like case could have done no otherwise themselves, then offered he this unto them, that if the justices of every court, unto whom the reformation of rigour of the law, by reason of their office, most specially appertained, would upon reasonable considerations, by their own discretions (as they were, as he thought, in conscience bound) mitigate and reform the rigour of the law themselves, there should from thenceforth by him no more injunctions be granted. Whereupon, when they refused to condescend, then said he unto them: 'Forasmuch as yourselves, My Lords, drive me to that necessity for awarding our injunctions to relieve the people's injury, you cannot hereafter

[1] Vol. iv 453-455, 461.

[2] Roper, Life of More (Everyman's Library) 41-43; Life of More, by his grandson Th. More, 207-210.

[3] Roper, 28, 29; Life of More, by his grandson Th. More, 164-165.

[4] Which gave rise to the following verse, cited Campbell, Chancellors i 551:—

> "When More sometime had Chancellor been,
> No *more* suits did remain:
> The same shall never *more* be seen,
> Till More be there again."

[5] "This Lord Chancellor used commonly every afternoon to sit in his open hall to the intent, if any person had any suit unto him they might the more boldly come to his presence, and there open complaints before him. Whose manner was also to read every bill himself, ere he would award any subpœna, which bearing matter sufficient worthy a subpœna would he set his hand unto, or else cancel it," Roper 29.

any more justly blame me.'"[1] The result of his tenure of office was to restore harmonious relations between the Chancery and the common law courts till the revival of the struggle in the latter part of the sixteenth century—a revival which culminated in the dispute between Coke and Ellesmere. That harmonious relations had been restored can be seen from the fact that Bacon and the other lawyers, whom James I. called in to advise him,[2] were able to report that injunctions had been issued by the chancellor for the last sixty years—" and that in the time when the same authority was managed, not only by the bishops, which might be thought less skilful or less affectionate towards the laws of the land, but also divers great lawyers, which could not but know and honour the law as the means of their advancement Sir Thomas More, and the Lord Audley, the Lord Rich, Sir Nicholas Bacon, Sir Thomas Bromley, and Sir John Puckering; and further, that most of the late judges of the kingdom, either as judges when they sat in Chancery by commission, or as counsellors at law, when they set their hands to bills, have by their judgment and counsel upheld the same authority."[3]

There were, as I have said, occasional reversions to chancellors of the older type. But they were generally due to temporary political causes. From 1551-1558 there are a succession of episcopal chancellors. The appointment of Goodrich, bishop of Ely, as Lord Keeper in 1551 was not at first intended to be permanent.[4] It was not till 1552 that he was made permanent chancellor—possibly Northumberland thought that it would be easier to persuade the bishop to put the great seal to Edward's attempted resettlement of the throne than a common lawyer. Mary's appointments of Gardiner and Heath were in agreement with her general policy of restoring so far as possible the old order in church and state. But otherwise, except for the short chancellorship of Wriothesley[5] (1544-1547), and the purely temporary appointment of Lord Paulet in 1547, the seal was in the hands of common lawyers. Audley, who had attained the rank of king's serjeant, held it from 1532-1544;[6] and Rich, who had been solicitor-general, held it from 1547-1551. Neither can be said to have adorned the office. Audley

[1] Roper, Life of More 30, 31. [2] Vol. i 463.

[3] Cary, Reports in Chancery 125; for an instance in 1581 where the judges advised the plaintiff, a widow, who had got two verdicts at law in an action for dower, to get an injunction from the chancellor to quiet possession, see Monro, Acta Cancellaria 506-507.

[4] Dict. Nat. Biog.

[5] He was a member of Gray's Inn, but he had made his way at Court, and not by following the profession of the law.

[6] A long judgment delivered by Audley as chancellor is reported in Y.B. 27 Hy. VIII. Mich. pl. 6 (pp. 18-20).



was a pliant instrument of Henry VIII.'s caprice, and took a leading part in most of the state trials of the period. Rich's character has been branded for all time by Sir Thomas More;[1] and the latest historical research, adjudicating upon Rich's whole career, has pronounced a sentence quite as severe.[2] Both he and Audley stand condemned for the part which they took in More's trial and condemnation.[3]

The growing influence of the common lawyers upon the administration of equity is also illustrated by the fact that, from the latter part of Wolsey's chancellorship, when commissions were issued to help the chancellor or to perform his duties during his absence or during a vacancy in his office, common law judges were usually placed upon them.[4] It is true that they were not placed upon the authorized commission issued by Wriothesley in 1544,[5] or upon the unauthorized commission issued by him in 1547.[6] But the issue of the latter commission was, as we have seen, made the occasion for his deprivation;[7] and the fact that it was composed mainly of civilians was given prominence in the petition of the students of the common law against the doings of the court of Chancery. These students clearly regarded it as irregular that the court of Chancery should be wholly controlled by civilian masters and clerks unassisted by any representative from among the common lawyers.[8]

[1] "In good faith, Master Rich, I am sorrier for your perjury than for mine own peril, and you shall understand that neither I, nor no man else to my knowledge ever took you to be a man of such credit as in any matter of importance I or any other would at any time vouchsafe to communicate with you. And I (as you know) of no small while have been acquainted with you and your conversation, who have known you from your youth hitherto, for we long dwelled together in one parish. Whereas yourself can tell . . . you were esteemed very light of your tongue, a great dicer, and of not commendable fame. And so in your house at the Temple . . . you were likewise accounted," Roper 59-60.

[2] "A time server of the least admirable type, he was always found on the winning side, and he had a hand in the ruin of most of the prominent men of his time, not a few of whom had been his friends and benefactors—Wolsey, More, Fisher, Cromwell, Wriothesley, Seymour, Somerset, and Northumberland," A. F. Pollard, Dict. Nat. Biog.

[3] Roper 59-63; More, Life of More 257.

[4] For the commission issued in 1529 see Rymer, Foedera (ed. 1713) xix 299—it was addressed to the Master of the Rolls, the Chief Baron of the Exchequer, a judge of the King's Bench and Common Pleas, a baron of the Exchequer, six clerks of the Chancery and ten others; for other similar commissions granted to two judges, six Masters and the Master of the Rolls under Rich and Goodrich see Foss, Judges v 279; judges were on the commission to hear cases in Chancery after Hatton's death, ibid 397; and also on the commission issued after the fall of Bacon, ibid vi 4; Bishop Williams was assisted by two judges in dealing with the difficulties which arose from the fire in the Six Clerks' Office in December, 1621, Sanders, Chancery Orders i 143, 146. [5] Rymer, Foedera xv 58.

[6] Dasent ii 51-52; both commissions were composed of the Master of the Rolls, a master and two clerks of the Chancery.

[7] Vol. iv 253, 257.

[8] "And for a more amplyfyeing and inlarging of the jurisdiction of the saide Courte of Chauncery and deroyacion of the saide Commen Lawes there is of late a

With the accession of Elizabeth the process of transition to the lawyer chancellors, under whom equity gradually began to assume its modern shape, is, in effect, complete. From 1558 to 1649 it was only for the space of eight years—between 1587 and 1591 when Christopher Hatton was chancellor, and between 1621 and 1625 when Bishop Williams was chancellor—that the seal was held by one who had not been educated as a common lawyer. Let us glance at the careers of these two exceptional chancellors before passing on to the important holders of the office.

Hatton was pre-eminently a courtier, and, in addition, something of a statesman. There is evidence that in an age, not very marked for administrative purity, he set a high standard.[1] He admitted that he was not "acquainted with the course of the law."[2] But he had a clear idea of the place of equity in the legal system—addressing a newly made serjeant, he told him that he would so far as possible help the due administration of the law, and that disputes should so far as possible be settled by the law alone, as equity only exists to help "the rigour and extremities of the law."[3] He was always assisted by some of the masters;[4] and Camden tells us that, though the lawyers grumbled at his appointment, "he supplied by his equity and justice what he wanted in legal knowledge."[5] Williams had studied in his youth the elements of the common law;[6] and, while a chaplain in Egerton's house, he had discussed with him cases which had come before him in the Chancery and Star Chamber.[7] Rumour said that the king, after Bacon's fall, insisted upon appointing him because he despaired of finding an

Commission made contrary to the saide Commen Lawes unto certaine persones, the more parte whereof be Civilians not learned in the saide Lawes of this realme," Dasent ii 50.

[1] Nicolas, Memoirs of Sir C. Hatton 388.

[2] Speech to Serjt. Clerke, Sanders, Chancery Orders ii 1036, "I have not bene acquainted withe the course of the lawe, althoughe in my youthe I spent some time in the studye thereof."

[3] Ibid—"I will be an assistannte and servaunte unto you in all your good proceedings. But I tell you and mark it well I finde that manye are called hether and muche money spent and in the ende their cawses dismissed to the lawe, where they might have begonne at the first if the parties had been well informed and councelled. We sitte heare to helpe the rigor and extremeties of the lawe."

[4] Ibid i 60, 61.

[5] Annales (ed. 1615) i 475—"Christopherus vero Hattonus florentissima apud principem gratia, suffectus erat ex Aula Cancellarius, quod Juris Anglici consultissimi permoleste tulerunt. Illi enim ex quo Ecclesiastici de gradu dejecti, hunc Magistratum, summum togatæ dignitatis culmen, viris Ecclesiasticis et Nobilibus plerumque olim delatum, magna cum æquitatis et prudentiæ laude gesserunt. . . Splendidissime tamen omnium quos vidimus gessit, et quod ex Juris scientia defui æquitate supplere studuit."

[6] Hacket, Life of Williams i 27.

[7] "He would impart to him the narration of some famous causes that had been debated in Chancery or Star Chamber," ibid i 28.



honest lawyer.[1] After his appointment he furbished up his law with the help of Henry Finch.[2] To appease criticism he let it be known that his appointment was merely temporary;[3] and he promised in the speech which he made on entering office, "to make no decree that shall cross the grounds of the common or statute laws," to use expedition, and not without cause to disturb the decrees of his predecessors.[4] Clarendon tells us that the general opinion was that he was "unequal to the place;[5] but, by acting upon the principles which he had laid down, he appears to have been successful in conciliating both the common lawyers[6] and the officials of the court."[7]

We must now turn to the careers of those lawyer chancellors who may justly be considered the fathers of our modern system of equity.

Nicolas Bacon[8] was lord keeper during the first twenty-one years of Elizabeth's reign (1558-1579). At Cambridge he had been one of the famous band of humanists; and he was a friend of Cecil and Parker, to the former of whom he became related through his second wife. Throughout his life he was keenly interested in all educational projects. He, Denton, and Cary prepared a scheme for the establishment of a college for the education of statesmen;[9] in 1561 he wrote a letter to Cecil, who had just been appointed master of the wards, as to the proper method of educating the Queen's wards;[10] and in his later years he founded a grammar school, and scholarships to enable boys from his school to go to Cambridge.[11] Already in Edward VI.'s reign he was attorney of the court of Wards, and a bencher of Gray's Inn; and he managed to retain his post in the court of Wards under Mary. As lord keeper he distinguished himself for

[1] S.P. Dom. 1619-1623 267, cxxi 121, Chamberlain writing to Carleton says—"the king said that he was resolved to have no more lawyers, for they were so nursed in corruption that they could not leave it off."

[2] "Having the assistance of Sir Harry Finch, a most profound lawyer, whom he kept in his lodgings from May to October, for all sorts of advice," Hacket, op. cit. i 60; for Finch see below 233, 399-401.

[3] Ibid 56.

[4] Ibid 73.

[5] History of the Rebellion (ed. 1843) 19.

[6] Buckingham, trying to find an excuse for getting rid of him, tried to persuade Hobart C.J. to say he was not fit for the post, to whom Hobart replied, "somewhat might have been said at the first, but he should do the Lord Keeper great wrong that said so now," Hacket, op. cit. i 201.

[7] Similarly, Evelin, one of the Six Clerks, spoke well of him, ibid.

[8] Foss, Judges v 447-456; Dict. Nat. Biog.

[9] Maitland, English Law and the Renaissance 72-73.

[10] Archæologia xxxvi 343-344—he points out that "the chiefe thing, and most of price, in wardeship is the wardes mynde; the next to that, his bodie; the last and meanest his land. Nowe, hitherto the chiefe care of governaunce hath bin had to the land, being the meaneste; and to the bodie, being the better, very small; but to the mynde, being the best, none at all, which me thinkes is playnely to sett the carte before the horse."

[11] Dict. Nat. Biog.

the sanity of his advice on political matters; and, though he temporarily lost the favour of the Queen by his supposed complicity in a pamphlet which advocated the claims of the Grey family to succeed to the throne, he was soon restored to favour.[1] Queen Elizabeth frequently visited him at his house at Gorhambury. He was never afraid to give her independent advice, and could clothe it in a witty saying—she once asked him his opinion of a certain monopoly licence, and he answered, "Will you have me speak truth, Madam? Licentia omnes deteriores sumus."[2] He was, as Camden puts it, "Vir præpinguis," which gives point to his reply to the queen, who had remarked that his house was too small for him, that on the contrary "he was too large for his house."[3]

As a judge of the court of Chancery he seems to have won universal respect. He stoutly upheld the dignity of the court both as against the common lawyers, and as against the privileges of the peerage. As against the common lawyers he vindicated the rights of the suitors of the court to freedom from arrest; and, in a conference with the two chief justices, he successfully proved that the privilege claimed was ancient, necessary and reasonable.[4] As against the peerage he proved that they, like other persons, could be attached for contempt—a question which arose out of the case of *Taverner* v. *Lord Cromwell*, in which the defendant had disobeyed an injunction, refused to be examined as to his disobedience, and departed in contempt of court.[5] He did much to improve the organization of the court and its rules of procedure. He made elaborate rules for the duties and conduct of the cursitors, secondaries,[6] and the six clerks.[7] The cursitors office in Chancery Lane was founded by him.[8] It was while he was chancellor that we get the first detailed rules as to the procedure of the court. The earlier orders had been for the most part concerned with the organization of the court.[9] The rules of procedure had been scanty and vague. They had dealt chiefly with the duties and rights of the officials. Practically the only existing rules of procedure relating to the equitable jurisdiction

[1] Dict. Nat. Biog.
[2] Bacon, Apophthegms Works (Ed. Spedding) vii 125.
[3] Archæologia xxxvi 340. [4] Sanders, Orders in Chancery i 20-24.
[5] Monro, Acta Cancellaria 386-392; Tothill 14; Monro says op. cit. 392 n. 1, that in Hargrave MS. no. 281, f. 211 is a copy of Bacon's argument as to peers being attachable in Chancery, which was occasioned by this case; this was printed in 1641, Dict. Nat. Biog.; he was also interested in a project, which his more famous son much desired to effect,—the simplification of the statutes, ibid.
[6] Sanders, Orders in Chancery i 28-33, 36-50. [7] Ibid 53-54, 55 56.
[8] Dict. Nat. Biog.; it was ordered in 1573 that "all the said cursitors shall both for the better service of the Court and increase of knowledge every terme keep together in one house office and place," Sanders, op. cit. i 39.
[9] Ibid 1-19.



of the court were one or two dealing with the issue of subpœnas, and the examination of witnesses.[1] Bacon issued some very much more detailed rules as to the examination of witnesses,[2] as to the issue of injunctions,[3] as to the issue of writs of subpœna for beginning a suit in equity and writs of certiorari,[4] as to the issue of writs of subpœna to witnesses to testify,[5] and as to contempts.[6] Further he ordered that "suits for no more than six acres of land or less, except the same be worth 40 shillings by the year, and all suits for matters under the value of ten pounds shall be dismissed this Court, for such cause only proved"[7]—a rule repeated by later chancellors,[8] but not always observed by suitors.[9] Bacon died in 1579, universally respected and lamented—a man, says Camden, ingenio acerrimo, singulari prudentia, summa eloquentia, tenaci memoria, et sacri concilii alterum columen."

After an interval of two months the great seal was given to Thomas Bromley[10] (1579-1587). He came of a legal family. His father had been a reader of the Inner Temple, his cousin chief justice of the Queen's Bench, his brother chief justice of Chester, and his nephew a baron of the Exchequer. He was one of the most popular counsel of his time,[11] and was made solictor-general in 1569. He was an abler man than Gerard, the attorney-general, over whose head he was promoted, Gerard being made master of the rolls. We can see from his speech at a call of serjeants[12] that he had high ideals of professional honour, and, as we might expect, a great respect for the common law; and no doubt, largely on that account, the relations between law and equity were harmonious during his tenure of office.[13] Coke testifies to his "great and profound knowledge and judgment in the law;"[14] and we hear no complaints as to his decisions in the court of Chancery. His most notable appearance as chancellor was as president of the court which tried Mary Queen of Scots. He was far from being a mere courtier, and could maintain his independence even as against royal pressure. He refused to give any special privileges for the trial of one Knyvet,

[1] Sanders, op. cit. i 7d. § 17 (Hy. V.); 9 (Hy. VIII.); 14, 15 (Mary); 19 (Mary).
[2] Ibid 24, 25. [3] Ibid 26. [4] Ibid 26, 33.
[5] Ibid 34, 35. [6] Ibid 54a.
[7] Ibid 27. [8] Below 230 n. 12.
[9] Monro, Acta Cancellaria 92, 115. 119, 313, 355, 357-358, 359, 362.
[10] Foss, Judges v 463-466; Dict. Nat. Biog.
[11] Lloyd, State Worthies 610 (cited Dict. Nat. Biog.) says that "for five years he was the only person that people would employ."
[12] Printed by Sanders, op. cit. ii 1033-1035.
[13] "Not to bring causes hither to this Court upon false surmises [nor] except for *summum jus summa injuria* doth follow, or the trust or true intent of the party be abused, or simplicity circumvented by craft," ibid 1034.
[14] Shelley's Case (1579-1581) 1 Co. Rep. at f. 105b.

a groom of the chamber, who had killed a man se defendendo; and his argument convinced the queen that he had done right.[1] He does not seem to have issued many fresh orders for the conduct of business in his court.[2] His successor Hatton[3] seems to have been a more active legislator. He made an order as to the days for hearing cases and making orders;[4] as to the hearing of cases in forma pauperis;[5] and for the due maintenance of order in court during the hearing of cases.[6]

With the appointment of Hatton's successor—Puckering (1592-1596)—we have a reversion to the lawyer chancellors.[7] Puckering had made his career at the common law. He attained to the rank of queen's serjeant, and had been Speaker of the House of Commons. He had appeared for the crown in several important state trials—among others at that of the unfortunate Davison;[8] and it was at the close of the trial of Perrot, lord deputy of Ireland, that he was made lord keeper. He apparently allowed his servants to dispense his ecclesiastical patronage in a simoniacal manner. But Camden acquits him of complicity in their acts;[9] and there are no complaints of his decisions. He issued several salutary orders, designed to check frivolous demurrers and answers,[10] irregular affidavits,[11] lengthy pleadings,[12] untrue allegations in bills,[12] and suits for trivial matters.[12] Other orders dealt with the duties of the six clerks[13] and the examination of witnesses.[14] Perhaps with a view of preventing the common law courts from encroaching upon the field of equitable jurisdiction, he made orders that certain writs—such as Audita Querela, Estrepement, and one or two others—were not to be issued without his sanction.[15] His successor was Egerton, whose career, Camden tells us, was looked forward to "magna expectatione et integritatis opinione." Nor was the public expectation and opinion destined to be deceived.

[1] Nicolas, Life and Times of Hatton 256-261, 263. Hatton wrote—"I have showed unto her Majesty your honourable and grave letters in answer of those which, by her Highness' direction, I sent unto you of late, touching Mr. Knyvet, which were in all respects so acceptable . . . as it pleased her very graciously to commend them; allowing your judgment for the stay and respite of the special commission to be no less considerate and agreeable to justice than this answer of yours importing the same effect to be wise and full of all honourable and orderly dealing."

[2] Sanders, op. cit. i 57-59 prints only two of Bromley's orders, and they are of no great importance.

[3] Above 226.

[4] Sanders, op. cit. i 59a.

[5] Ibid 61.

[6] Ibid 63-64.

[7] Foss, Judges v 531-534; Dict. Nat. Biog.

[8] "Gaudius et Puckeringus ad Legem Servientes, jam hominem magna vi verborum arguunt quod Consiliariorum Regiorum prudentia callide sit abusus," Camden s.a. 1587.

[9] "Qui ob famulorum sordes et corruptelas in Ecclesiasticis beneficiis nundinandis ipse vir integer apud Ecclesiasticos haud bene audivit," s.a. 1596.

[10] Sanders, op. cit. i 64-65.

[11] Ibid 66-67.

[12] Ibid 69-70.

[13] Ibid 70.

[14] Ibid.

[15] Ibid 65, 67, 68, 70; cp. Hazeltine, Essays in Legal History 276-277—it appears that the restriction on the issue of writs of estrepement is older than Egerton's chancellorship; for this writ see vol. ii 248-249, 344 n. 6.



The chancellorship of Sir Thomas Egerton, afterwards created Lord Ellesmere and Viscount Brackley, lasted like that of Sir Nicholas Bacon, for twenty-one years (1596-1617). Since the chancellorship of Sir Thomas More there had been no more important epoch in the earlier history of equity. Just as the chancellorship of Sir Thomas More marked the period when the administration of equity was transferred from the ecclesiastical to the common law chancellors, so the chancellorship of Lord Ellesmere marked the period when the relations of equity, thus administered, to the common law were finally ascertained.[1] The chancellors succeeding Sir Thomas More had kept equity in close touch with the law: the chancellors succeeding Lord Ellesmere were able, in consequence of his vindication of the independent position of the court of Chancery, to begin to develop systematically the principles upon which they were prepared to give equitable relief.

Egerton[2] was called to the bar in 1572, and rapidly acquired a large practice in Chancery. He became solicitor-general in 1581, and it is said that the queen promoted him after hearing him plead against her—"In my troth," she is reported to have said, "he shall never plead against me again." In 1594 he was made master of the rolls, and in 1596 lord keeper and a privy councillor—again it is said by the queen's express wish and contrary to that of Burghley. In 1603 James I. made him lord chancellor, and raised him to the peerage by the title of Baron Ellesmere. In 1616 he was created Viscount Brackley. In 1617 he at last induced James to accept his resignation,[3] and died twelve days later.

Egerton was a great deal more than a mere lawyer. Elizabeth frequently consulted him on matters both of home and foreign policy. On James's accession he soon showed pronounced royalist proclivities. After the Hampton Court conference he declared that he had "never before understood the meaning of the legal maxim that *Rex est mixta persona cum sacerdote*."[4] In his own court he showed, in the case of Whitelocke, that he would listen to no argument against the prerogative.[5] He would have

[1] Vol. i 461-463.

[2] For the main facts of his life see Foss, Judges vi 136-152; Dict. Nat. Biog.

[3] S.P. Dom. 1611-1618 449, xc 135, Gerrard writing to Carleton says—"Chancellor Ellesmere . . . petitioned the king daily for eight or ten days to allow him to resign, and at last refused to seal patents sent; on which the King visited him, found him weakened in mind and body, and sent for the seal"; ibid 441, xc 105. Chamberlain writing to Carleton tells much the same tale; Gardiner iii 76-78.

[4] Ibid i 157.

[5] Liber Fam. (C.S.) 32-37; below 350; Gardiner ii 188, 189; Spedding, Letters and Life of Bacon iv 347. Whitelock, Liber Fam. 53 describes him as "the

liked to prevent Parliament from even discussing the king's power to levy impositions;[1] he would have given far greater authority to proclamations than the common lawyers allowed;[2] and he could not forbear from pointing out to Mountague, Coke's successor, the proper political moral to be drawn from Coke's dismissal.[3] Yet he could oppose the king when he wished to do obviously foolish acts. He absolutely refused to seal a pardon for Somerset which was drawn in extravagantly wide terms, though pressed to do so by the king in person, unless the king first gave him a pardon for sealing it.[4] His political views joined with his professional feelings in his successful resistance to Coke's attempt to limit the competence of his court.[5] But of the effects of this his last, and in some respects his most important achievement, I cannot speak fully till his career as a lawyer has been considered.

It is clear from Hudson's book on the court of Star Chamber that Egerton's work in organizing its staff and its procedure played a great part in making it a regular and a settled court.[6] He performed somewhat the same service for the court of Chancery. He made orders to ensure the truth of pleadings and depositions,[7] for the further regulation of the office of the six clerks,[8] for shortening the time within which replications must be delivered,[9] for attachments,[10] for the conduct of examinations,[11] for drawing up the records of the court,[12] for shortening bills and answers,[13] for the conditions under which injunctions could be obtained to restrain common law actions.[14] He was not very ready to hear cases which involved the taking of merchants' accounts;[15] and, unless in special cases, he refused to

greatest enemye to the common law that ever did bear office of state in this kingdome;" but this was hardly just, nor was it true, see below 236.

[1] Gardiner ii 366.

[2] See his judgment in Calvin's Case (1609) 2 S.T. at p. 669.

[3] After recounting various acts of Coke as examples to be avoided he said—"Remember also the removing and putting down of your late Predecessor, and by whom, which I often remember unto you, that is, by the Great King of Great Brittain whose great Wisdom and Royal Vertues and Religious Care, for the Weal of his Subjects, and for the due administration of Justice, can never be forgotten," Moore, Rep. 828-829.

[4] Gardiner ii 329, 330. [5] Vol. i 461-463. [6] Ibid 501.

[7] Sanders, Chancery Orders i 73-74. [8] Ibid 74-75; 82a-84.

[9] Ibid 77. [10] Ibid 77-78. [11] Ibid 77-79a.

[12] Ibid 80-82. [13] Ibid 86-87.

[14] Ibid 87—"Noe injunction to staie the common lawe after judgment virdict or yssue, but in the case where there is priority of suite in the Chancery, and the same followed with effect." This is alluded to by Bacon, on his taking his seat in Chancery (Spedding, op. cit. vi 185-186) as a salutary reform; and he illustrated the need for it by an anecdote of what happened in Bromley's time.

[15] Sanders, op. cit. i 86—"Marchants accompts and such like are not to be examined in the Chauncery for none is to accompt upon oath but to the King onely. Yet frawd and covyn is to be examined and punished."



entertain suits to stay the payment of debts.[1] On the procedure to be followed when parties were fined for contempt he confirmed a ruling contained in a Year Book case of 1489.[2] He had and deserved the reputation of being a strict disciplinarian in his court.[3] He ordered pauper plaintiffs who had sued without cause to be whipped.[4] He threatened defendants with irons or close imprisonment if they refused to obey a decree;[5] and he committed a defendant to the Fleet for inserting scandalous matter of his predecessor in a bill of revivor.[6] The punishment of Richard Mylward for drawing a replication containing 120 pages when 16 would have sufficed was exemplary.[7] Even learned lawyers like Henry Finch were sharply rebuked if they ventured to put in insufficient pleadings.[8] He saw that the masters of the court did their duty and kept to the matters referred to them.[9] In his later years he perhaps became a little more remiss in this respect.[10] It may perhaps be inferred from Bacon's speech on taking his seat in Chancery that too much discretion had been allowed to the masters, and too little consideration given to the justice of their reports,[11] with the result that there were, as he explains in one of his letters, frequent petitions for rehearing.[12] And Bacon tells us expressly that

[1] "Bills to staie payment of debts which are due by statute recognizance obligacion or bill are not to be allowed unlesse it be in speciall cases where there is no willfull default or grosse negligence. And the like for condicions broken upon leasses mortgages, etc.," Sanders, op. cit. i 86.

[2] Ibid 87, referring to Y.B. 10 Hy. VII. Mich. pl. 6.

[3] S.P. Dom. 1611-1618 453, xc 146—Chamberlain writing to Carleton says that he had "the character of being severe, implacable, an enemy to Parliaments, and a maintainer of exorbitant powers for the Chancery Court."

[4] Monro, Acta Cancellaria 709, 734; Monro says, op. cit. 709 n. 2—"I have not found orders of this kind previously to the time of Lord Keeper Egerton; but while he presided in the Court of Chancery, and long after, they were very far from unfrequent."

[5] Ibid 718, 719, 740, 747. [6] Ibid 697-698.

[7] Ibid 692-693—"It is therefore ordered that the Warden of the Fleet shall take the said Richard Mylward . . . into his custody, and shall bring him unto Westminster Hall on Saturday next . . . and there and then shall cut a hole in the myddest of the same engrossed replication . . . and put the said Richard's head through the same hole, and so let the same replication hang about his shoulders with the written side outward; and then, the same so hanging, shall lead the same Richard, bare headed and bare faced, round about Westminster Hall, whilst the courts are sitting, and shall shew him at the bar of every of the three courts within the Hall."

[8] Ibid 703; for Finch, and the order made on this occasion, see below 343 and n. 5.

[9] Ibid 715-716.

[10] Chamberlain reported, S.P. Dom. 1611-1618, xcii 18, that Bacon in his speech, "praised the earlier course of his predecessor, but excepted against his later acts" there is no direct criticism of this kind in the speech as it has come down to us, but it has not come to us quite complete, Spedding, op. cit. vi 182.

[11] Ibid 187—"The fourth point is concerning the communicating of the authority of the Chancellor too far; and making upon the matter too many Chancellors, by relying too much upon the reports of the masters of the Chancery as concludent."

[12] Ibid 283—"The causes that I dispatch do seldom turn upon me again, as his many times did."

after full and solemn hearing judgment was often too long delayed.[1]

Probably, as I have said, these were faults which began to appear in his later years when he was really too ill to deal with the mass of business of various kinds which weighed upon him. Age and infirmity he tells us had at first made him hesitate to deliver a long judgment in *Calvin's Case*.[2] But there is no sign that his age or infirmities had in any way impaired the universal admiration which both lawyers and laymen felt for his conduct as an equity judge. "All Christendom," says Fuller,[3] "afforded not a person which carried more gravity in his countenance and behaviour than Sir Thomas Egerton, in so much that many have gone to the Chancery on purpose only to see his venerable garb. . . . Yet was his outward case nothing in comparison of his inward abilities, quick wit, solid judgment, ready utterance." In 1608 Hawarde,[4] describing the delivery of the judgments in Calvin's Case tells us that, "He argued very profoundelye and was exceedinge longe, but reade much in his booke and had taken infinite paines, for he had wrote a greate volume, and was allmost 4 houres in his argumentes." It is probable that the respect which he inspired was no small factor in reconciling the professional opinion of the common lawyers, to the king's decision in favour of his court.

He published nothing except his argument in *Calvin's Case;* and this he says he had only done at the king's command, partly because numerous "unperfect reports" were in circulation, partly there might be as good a report of his speech as Coke had made of the speeches of the rest of the judges.[5] Certain tracts on the court of Chancery and on the office of a lord chancellor have been ascribed to him; but they were almost certainly not written by him;[6] and there is no warrant for ascribing to him the volume

[1] Spedding, op. cit. vi 189, 190—"For it hath been a manner much used of late in my last Lord's time (of whom I learn much to imitate, and somewhat to avoid) that upon solemn and full hearing of a cause nothing is pronounced in court, but breviates are required to be made. . . . But yet I find when such breviates were taken, the cause was sometimes forgotten a term or two, and then set down for a new hearing, or a rehearing three or four terms after. And in the meantime the subject's pulse beats swift though the Chancery pace be slow."

[2] The speech of the Lord Chancellor of England in the Exchequer Chamber touching the Post Nati, Pref.; it was printed for the Society of Stationers, and published in 1609.

[3] Worthies of England (ed. 1662) 176.

[4] Les Reportes, etc., 386.

[5] The speech of the Lord Chancellor, etc., Pref.—"Diverse unperfect Reports, and several patches and peices of my Speech have bin put in writing, and dispersed into many hands, and some offered to the Presse. The King's Majestie having knowledge thereof, misliked it, and thereupon commanded me to deliver to him in writing, the whole discourse of that which I said in that Cause. Thus I was put to an unexpected labour, to review my scribbled and broken papers."

[6] Below 271, 272-273.



of Observations on Coke's Reports, which sometimes passes under his name.[1] But he left to his chaplain, the future lord keeper Williams, some manuscripts, which have now disappeared, "for the well ordering of the High Court of Parliament, the court of Chancery, the Star Chamber, and the Council board."[2] Owing to the absence at this period of regular reports of cases in Equity, it is impossible to come to any very clear first-hand conclusion as to his merits as a judge. The formal records of the court of Chancery, like the formal records of the courts of common law, are so impersonal that they tell us little of the intellectual qualities of the men whose doings they recount, and nothing of the way in which they reasoned out their decisions. In Ellesmere's case, however, we are slightly better off. We have one fairly full report of his judgment in the *Earl of Oxford's Case*,[3] which was no doubt made because it was one of the cases which led up to the famous controversy with Coke.

We can see from his argument in this case that the court was still primarily a court of conscience. The basis of equity laid down in the Doctor and Student[4] is the basis of the judgment in the case. The chancellor is the king's delegate, accountable only to him for his use of his absolute power to purge the defendant's conscience.[5] But we can see in the citation of cases and precedents the influence of the new school of lawyer chancellors. The usages and customs of the court are a law to the court.[6] They, and the rules of equity laid down by the court, are as much a law as any other part of the common law.[7] It is fairly clear that the process which will reduce to rule and system the occasions upon which the chancellor will interfere to purge a corrupt conscience, has not as yet gone very far; but we can see

[1] Below 478 n. 1.

[2] Hacket, Life of Williams Pt. I. 30-31; "These notes," says Hacket, "I have seen, but are lost, as it is to be feared, in unlucky and devouring times," ibid 31.

[3] 1 Chancery Reports 1-16.

[4] Vol. iv 279-281.

[5] "The Chancellor must give account to none but only to the King and Parliament. The cause why there is a Chancery is for that men's actions are so divers and infinite, that it is impossible to make any general law which may aptly meet with every particular act, and not fail in some circumstances. The office of the Chancellor is to correct men's consciences for frauds, breach of trusts, wrongs, and oppressions, of what nature soever they be, and to soften and mollify the extremity of the law, which is called *Summum Jus*," at pp. 6, 7.

[6] "Every Court at Westminster ought to take notice of the usages and customs of the rest of the Courts at Westminster, which are as a law to those Courts, and of which the common law takes notice," at p. 13.

[7] "A Serjeant is sworn to give counsel according to law, that is, according to the law of God, the law of reason, and the law of the land; and upon both the laws of God and reason, is grounded that rule, viz.: To do as one would be done unto. And therefore where one is bound in an Obligation to pay money, payeth it and takes no acquittance, by the common law he shall be compelled to pay the money again. But when it appeareth, that the plaintiff will recover at law, the Serjeant may advise the defendant to take a Subpœna in Chancery, notwithstanding his oath," p. 8.

in embryo the beginnings of this process. That this process, soon after Ellesmere's death, began to develop rapidly is due in no small measure to his success in vindicating the freedom of his court from the control of the common law courts, and, in making it, in some respects, their superior.

It is the issue of this controversy, decided in the closing years of his life,[1] which, as I have said, makes his tenure of office a turning point in the history of equity. It is fairly clear that, in spite of contemporary rumours to the contrary,[2] Ellesmere did not seek to enlarge the jurisdiction of his court at the expense of rival courts. He did not encourage mercantile cases;[3] and he was content to leave jurisdiction over legacies[4] and the probate of wills[5] to the ecclesiastical courts. But he was driven to resist the concerted attack which Coke made upon his court, because, if it had not been resisted, it would have been impossible to administer any system of equitable relief except by the leave and licence of the common law courts.[6] It was really a fight for the existence of equity as an independent system. It was fortunate for the future development of English law that the issue was raised and decided at this date. The controversy between king and Parliament, between Puritan and Anglican, between the common lawyers and their rivals, had begun; but it had not yet become so embittered that it was impossible to arrive at a permanent settlement upon some of the points of difference. We have seen that the statute of James I. upon monopoly patents went a long way to effect such a settlement upon that much controverted question.[7] In the same way James' decision really effected a similar settlement upon this question of the right of equity to exist as an independent system.

It is true that the lawyers tried without success to induce the House of Commons to pass bills designed to cripple the Chancery.[8] It is true that the existence of equity was threatened when the outbreak of the Great Rebellion destroyed the constitution.[9] The Parliamentary party did not forget that the chancellor was the first official of the state as well as the judge of the court of Chancery; that the king had sometimes used the court of Chancery

[1] Vol. i 461-463. [2] Above 233 n. 3.
[3] Above 232 n. 15.
[4] Monro, op. cit. 94, 109-111, 117-118. [5] Ibid 761.
[6] As Bacon said, with reference to Coke's use of the statute of Præmunire against the Chancery (vol. i 462), it was, "A strange attempt to make the Chancellor sit under a hatchet instead of the King's arms," Spedding, op. cit. vi 91.
[7] Vol. iv 353-354.
[8] Hist. MSS. Com. 3rd Rep. App. 15, a bill of 1614 to prevent any proceedings in other courts after judgment at common law; ibid 29, a bill of 1623-1624 providing for an appeal from all courts of equity to the King's Bench or Common Pleas.
[9] Vol. i 431-434; above 217-218; below 445; vol. vi 417-418, 428.



to further his political views;[1] and that he had interfered with the chancellor's administration of justice.[2] It is true that some common lawyers of the straighter sort, who favoured the Parliament, wished to get rid of the Chancery both on political and professional grounds. But the decision of James was so obviously right; the need for a court of equity was so clear; the fact that the courts of common law and equity had, down to the outbreak of the Great Rebellion, worked well together[3] to the advantage both of the litigant and the law was so evident—that even under the commonwealth it was impossible to dispense wholly with equity;[4] and at the Restoration it silently resumed the place which had been given to it by James I.'s decree. The objections which some few common lawyers continued to raise right up to the end of the seventeenth century have merely an academic interest.[5]

It was fortunate even for the common law that this was so. If the common law had succeeded in reducing all its rivals to insignificance it would have been in considerable danger of becoming as hide bound as it was threatening to become in the fifteenth century.[6] The development which the healthy rivalries of the sixteenth century had produced might have been stayed. It was still more fortunate for English law as a whole. Even if the common law had continued to develop, there were many proprietary relations, many social relations, many business relations, which the machinery of the common law could not have regulated adequately. We have only to think of such topics as the law of trusts, of mortgage, of guardianship, of partnership, of administration of assets, to see that this is obviously true. The growth of all these branches of law would have been hardly possible if they could only have been dealt with by the machinery of the common law; and their development by equity would have been stunted if the machinery of the court could only have been

[1] Bacon said in a letter to the king written in 1615 (Spedding, op. cit. v 236)—"Your Majesty knoweth your chancellor is ever a principal counsellor and instrument of monarchy, of immediate dependence upon the king, and therefore like to be a safe and tender guardian of the regal rights"; in another paper (ibid vi 90-91) he states that Coke had prevailed against the Provincial Councils, "in such sort, as the Presidents are continually suitors for the enlargement of the instructions, sometimes in one point sometimes in another, and the jurisdictions grow into contempt, and more would, if the Lord Chancellor did not strengthen them by injunctions, when they exceed not their instructions"; see also Mayor of London v. Benet (1630-1631) 1 Ch. Rep. 44-45—a banker, who had lent money to the City for the City's loan to the king, tried to sue the City for it, and was stopped by an injunction.
[2] Monro, op. cit. 338—Case reheard by order of the Queen; 372—the Queen orders the Chancellor to retain a suit; 582—a case which had been dismissed to the Palatine court of Chester, reheard by the Queen's order; 556—actions at law for taking post-horses for the Queen's service stayed; for the cases where Buckingham interfered with Bacon's administration of equity see below 254 n. 3.
[3] Above 217; below 251-252. [4] Vol. i 431-434.
[5] Ibid 463-465. [6] Vol. ii. 591-597.

used under the supervision of the common lawyers. Probably that supervision would have had the same effect upon the court of Chancery as it had upon the court of Admiralty and the ecclesiastical courts.[1] It would have rendered it ineffective and useless. The only remedy would have been to invoke the aid of the legislature to restore or to create a court with the powers which James I.'s decree secured to the Chancery. It is not probable that a new statutory creation of that kind would have been as efficient as a court, which was already beginning to evolve a code of procedure, and, through the working of that procedure, a body of substantive rules.

Equity, then, was fortunate in securing its independent existence when it did. It was no less fortunate in securing, immediately afterwards, the guidance and direction of the friend and protegé of Lord Ellesmere,[2] and the most philosophic lawyer in England—Francis Bacon.[3] He consolidated the victory which Ellesmere had won, and gave to Equity a great impulse along that path of definition, and co-ordination with the rules of the common law, which, since the advent of the lawyer chancellors and until the late controversy,[4] had been silently proceeding throughout the greater part of the sixteenth century.

At the age of thirty-one Bacon told his uncle, Lord Burghley, that he had taken all knowledge to be his province;[5] and, as with many another of his statements, what in any other man would have been empty boasting, was with him a statement of sober fact. He could and did survey the field of existing knowledge, critically diagnosing the shortcomings of past thinkers, suggesting the need for inquiry by new methods into the unexplored kingdom of nature, and presenting a vision of the vast and beneficial extensions of the bounds of human knowledge which would follow from such an inquiry. It was as a philosopher that Bacon used

[1] Vol. i 556-558, 614-630.

[2] Gardiner iii 79—"For some time past the late Chancellor had lost no opportunity of speaking a good word for Bacon, and had expressly declared his wish that he might be his successor. The same exalted idea of the prerogative, the same desire to limit the jurisdiction of the Courts of Common law, animated them both."

[3] Spedding, Letters and Life, and his edition of Bacon's Works; Gardiner, History of England, and article in Dict. Nat. Biog.; R. W. Church, Bacon; J. E. G. de Montmorency, Francis Bacon in Great Jurists of the World (Continental Legal History Series) 144-168.

[4] Bacon's view, Spedding, op. cit. vi 198, that, "The former discords and differences between the Chancery and other courts was but flesh and blood; and now the men were gone the matter was gone"—has in it a good deal of substantial truth.

[5] Spedding, Letters and Life i 109—"I have taken all knowledge to be my province; and if I could purge it of two sorts of rovers, whereof the one with frivolous disputations, confutations, and verbosities, the other with blind experiments and auricular traditions and impostures, hath committed so many spoils, I hope I should bring in industrious observations, grounded conclusions, and profitable inventions and discoveries; the best state of that province."



these words; and we have seen that, as a philosopher, he both summed up the intellectual changes of the sixteenth century, and foreshadowed the new intellectual developments of the future.[1] But he was both a student of and a practitioner in many other branches of knowledge besides philosophy. Upon literature, history, politics, and law he left his mark. We are not here concerned with his achievements in literature and history; but we are concerned with his achievements in politics and law. Of his political career I shall speak in a later chapter.[2] In this and the following chapter we must consider him as a lawyer.

He was a more complete lawyer than any of his contemporaries. Not only was he an eminent practitioner in the common law; not only did he leave his mark as lord chancellor upon the development of equity; he also studied both English law and law in general scientifically and critically. The only other lawyer, in that age of distinguished lawyers, who can be compared with him, is his great rival Coke. And no two men could be more dissimilar in their mental outlook and their subsequent influence upon English law. Both, indeed, were eminent practitioners; but while Bacon is a great juridical thinker, Coke is a great common lawyer. Both left their marks upon English law; but while Bacon's influence was literary and scientific, Coke's was practical, and, owing to political causes, far greater.[3]

Less attention has perhaps been paid to the purely legal side of Bacon's career than to any other. But, from some points of view, it might perhaps be contended that this side of his intellectual activities is one of the most important. While "he was untimely going to bed and there musing *nescio quid* when he should sleep,"[4] he was a student of law as well as of other matters. And the legal training and practice, which occupied the greatest part of his active career, coloured his whole mental outlook, and influenced both his political and his philosophic thought. In the political world all the great controversies of the day, which were not purely theological, turned or were thought to turn upon doubtful points of public law; so that his legal studies fitted him to discuss them effectively from the point of view which most appealed to the men of his own day. It is significant that the philosopher who taught that man is the minister and interpreter of nature, and that he can only accomplish and understand in proportion as he has actually and intelligently observed the order of nature,[5] was a lawyer, taught

[1] Vol. iv 49-52. [2] Vol. vi 24-26. [3] Below 489-493.

[4] So his mother wrote in 1591, Spedding, Letters and Life i 114.

[5] "Homo, naturæ minister et interpres, tantum facit et intelligit, quantum, de naturæ ordine, re vel mente observaverit; nec amplius sciet aut potest," Nov. Org. Bk. i App. i.

to reason out his rules and principles from diverse decisions upon the concrete facts of individual cases. In law it was only by studying these individual cases that existing rules could be understood, and new developments of these rules be established. "It is a sound precept," he wrote, "not to take the law from the rules, but to make the rule from the existing law. For the proof is not to be sought from the words of the rule, as if it were the text of law. The rule, like the magnetic needle, points at the law, but does not settle it."[1] Bacon's conviction of the necessity for the study of the concrete facts of nature or of human life is, I think, not wholly unconnected with the fact that his legal training was in a system of case law.

Of Bacon as a common lawyer I shall have something to say in the next chapter.[2] Here we must look at him chiefly from the point of view of the influence which, as chancellor, he exerted upon the growth of equity. But to understand the nature of his influence, whether as a chancellor, a common lawyer, or a statesman, we must know something of the man himself. I shall therefore at this point attempt in the first place to describe the man himself, in the second place to say something of him as a jurist, and in the third place to give some account of his achievements as chancellor.

*The Man.*

The main facts of Bacon's life are so well known that it is only necessary to give a bare summary of important dates. He was the youngest son of Nicholas Bacon, and was born January 22nd, 1561. In 1573 he entered Trinity College, Cambridge, and in 1575 he was admitted to Gray's Inn. From 1576-1579 he was attached to the French embassy. The death of his father in that year recalled him to England, and made it necessary for him to devote himself seriously to the study of the law. He was called to the bar in 1583, and, probably by the influence of his uncle,[3] was admitted to the Readers' Table in 1586. He read in 1587 and 1599. In 1584 he had become a member of Parliament; and he soon made his mark in this new sphere. In 1591 he made the acquaintance of the earl of Essex, who tried in every way to push his fortunes. But he had offended the queen by his conduct in Parliament, and in her reign the only offices which he obtained were the reversion to the office of clerk to the Star Chamber, of which he did not get possession for twenty years,

[1] De Augmentis, Bk. viii c. 3 Aph. 85—"Recte jubetur, ut non ex regulis jus sumatur; sed ex jure quod est, regula fiat: neque enim ex verbis regulæ petenda est probatio, ac si esset textus legis: regula enim legem (ut acus nautica polos) indicat, non statuit"; the translation in the text is Spedding's.

[2] Below 485-489.

[3] Gray's Inn Pension Book 72 n. 1.



and the office of learned counsel Extraordinary without patent or fee.[1] The latter office shows that his abilities as a barrister were gaining recognition; and he was employed by the crown in connection with many state prosecutions. The part which he played in the prosecution of Essex, his friend and benefactor, has left a serious stain upon his name. It was not a creditable episode in his career; but we shall see that, under the circumstances and judged by the standpoints of his own day, there is more to be said for Bacon than posterity has sometimes imagined.[2] The promotion which Bacon had so long sought he at last got from James I. In 1607 he was made Solicitor-General. At the death of Salisbury in 1612 he offered his services to the king, and proposed to desert law for politics. But he failed to get the office of Treasurer, and also that of master of the wards, for which he had also applied. In 1613 he became Attorney-General, and in that capacity took a leading part in drawing up the decree in favour of the Chancery which ended the dispute between Coke and Ellesmere. In 1616 he became a Privy Councillor, and in 1617 Lord Keeper. In 1618 he became Lord Chancellor, and was raised to the peerage with the title of Baron Verulam. In 1622 he was created Viscount St. Albans. In the same year he was impeached by the House of Commons for bribery. He confessed his guilt, and was sentenced to pay a fine of £40,000, to be imprisoned during the king's pleasure, and to be incapable of sitting in Parliament or of coming within the verge of the court. The king remitted his fine and imprisonment; and, though he made one or two efforts to take some further part in politics, he did not succeed. The remainder of his life was perforce devoted to his literary work. He died April 9th, 1626. All through this active legal and political career he had never abandoned his philosophic aims. In 1605 he published the Advancement of Learning, in 1620 the Novum Organum or Instauratio Magna, and in 1623 the nine books of the De Augmentis.

The bare recital of the events of Bacon's career shows us that his character has in its elements of paradox and mystery, which must always make it a matter of speculation to historians who are brought into contact with it. And the more we know of the man, the more paradoxical and mysterious does his character appear. We admire his pregnant aphorisms, his eloquent prophecies of the results of the extension of man's kingdom over nature, his wise advice on all the political and religious and

[1] This is clear from his letter to James I. in 1620—"You found me of the Learned Counsel, Extraordinary, without patent or fee; a kind of *individuum vagum*," Spedding, Letters and Life vii 168; for the significance of this appointment, and the subsequent development of the new class of King's Council, see vol vi 473-5.

[2] Below 244 and n. 3.

legal questions of the day; we admire the wonderful technique of his legal arguments and other writings about legal matters, the large wisdom of his essays, and the wonderful literary style of all the productions of his pen; we know that as an orator, he was as effective in the law courts as in Parliament. And then we find him noting down as things to be remembered and attended to, petty tricks of style[1] and flattery,[2] and devices to get rid of those who stood in his way;[3] we find him, not only blind to the corruptions of the Court, but ready to take his tone from it, and to act as those around him were acting; we find that, in the face of the ideal of a just judge which he had many times portrayed,[4] he was driven to confess himself guilty of the very offences against which he had eloquently warned others. What then is the explanation?

Bacon had great ideals. As a philosopher considering the welfare of mankind, as a statesman considering the solution of the political problems of the day, as a lawyer considering projects of law reform, he never lost sight of these ideals. His hopeful temperament never allowed him to despair of inducing his contemporaries to realise some of them, never allowed him to see that these ideals were too lofty and too farseeing for men who lived for the present hour. "A fool could not have written such a book and a wise man would not," was the popular verdict on the Instauratio Magna;[5] and even James I. who, with all his faults, was a learned man, said that like the peace of God it passed all understanding.[6] And so, in spite of the fact that he had very many of the necessary qualities of a statesman—a

[1] "To suppress at once my speaking wth panting and labor of breath and voyce;" "To use at once upon entrance gyven of Speach though abrupt to compose and drawe in myself"; "To free myself at once from payt. of formality and complemt though with some shew of carelessness pride and rudeness," Commentarius Solutus, Spedding, Letters and Life iv 93, 94.

[2] "To furnish my L. of S. wth ornamts for publike speaches;" "To make him think how he should be reverenced by a L. Chr yf I were"; "At Counsell table cheefly to make good my L. of Salsb. nocions and speaches," ibid 93; and yet he wrote to the king immediately after Salisbury's death that "he was a fit man to keep things from growing worse, but no very fit man to reduce things to be much better. . . . He loved to have the eyes of all Israel a little too much upon himself. . . . He was more *in operatione* that *in opere*," ibid 280.

[3] "To have in mynd and use ye Att weakeness," ibid 50; cp. ibid 92; the Attorney was Hobart, whom Bacon succeeded when, on Bacon's advice, James made him chief justice of the Common Pleas, moving Coke to the King's Bench, below 436-438.

[4] See his speeches to Hutton, Spedding, Letters and Life vi 202; and to Whitelock, ibid vii 103; and the Essay of Judicature; it should be noted in the light of subsequent events that in his speeches to these two judges he said that not only must they be pure, but that they must see that the hands of their servants were pure likewise; Spedding notes that this advice to Whitelock was given on the same day as that on which he had made an order for Lady Wharton, having only two or three days before accepted from her a purse of £100, ibid vii 103 n. 1.

[5] S.P. Dom. 1619-1623 186, cxvii 37—Chamberlain to Carleton.

[6] Ibid 219, cxix 64—Chamberlain to Carleton.



persuasive tongue, a marvellously effective literary style, real eloquence inspired by genuine love for his country and for truth—he was too intellectually aloof from his own generation to influence it effectively.[1] He was always offering good advice which was generally rejected, and never completely followed.

But with all his idealism he was no mere academic speculator. He had a sternly practical side to his intellect. From his philosophy he hoped to see tangible fruit. His legal studies enabled him to earn his living at the bar. His political speculations he hoped would give him the high place in the state which he was conscious he could fill. And he was no ascetic. He loved the pomp and circumstance of high official position so well that he excited the ridicule of some of his contemporaries.[2] But in Elizabeth's court, and still more in the court of James I., the position which he sought could only be won by judicious flattery and adroit intrigue. Bacon saw this clearly enough. He entered for the race, and turned his matchless talents to win the favour of those who could give him what he desired. But he was never really at home in this enterprise. Since his high ideals often appear in the letters which he was constantly writing to beg favours, it is no wonder they failed to effect their object. And so for many years he was always a beggar for preferment who begged in vain.[3] His hopeful temperament sustained him; and his consciousness that he could serve his country, if he got what he desired, blinded him to the effect which this course had upon his reputation, and, what was more fatal, to the effects which it had upon his character.

All his life Bacon was absorbed in high quests. They left no room for any very keen personal feelings. His nature was

[1] Thus, S.P. Dom. 1619-1623 267, cxxi 121, Chamberlain writes that after his fall he was "vain and idle as ever."

[2] Carleton wrote in 1606—"Sir Francis Bacon was married yesterday to his young wench in Maribone Chapel. He was clad from top to toe in purple, and hath made himself and his wife such store of raiments of cloth of silver and gold, that it draws deep into her portion," cited Church, Bacon 99; S.P. Dom. 1611-1618 216, lxxv 52—Chamberlain reports in 1613 that he was "feasting the whole University of Cambridge and living in splendid style"; in 1618 ibid 535, xcvii 33—describing his visit to the Mercer's Chapel to hear the Archbishop of Spalato, he says—"The Chancellor was there in as great pomp as he went awhile ago to Sir Baptist Hicks' and Barnes' shops to cheapen and buy silks and velvets."

[3] As to this matter of suing for office I think that Spedding successfully defends Bacon; speaking of his letter to the king in which he applied for the post of Lord Chancellor (Letters and Life v 244) he says—"When Bacon says that he should for his own part 'suspect' a man who sued to be made a judge, he did not mean a man in the position of Attorney-General, or otherwise entitled to offer counsel in such matters; still less a man whose suit consisted in an appeal to the personal knowledge of his qualifications possessed by the patron himself, as proved in a long course of service. If all suits were urged on similar grounds and in a similar spirit to this, there would be no more harm in suing for a judicial office than for any other"; this is very true of many of Bacon's other applications for office.

extraordinarily unemotional.[1] He was not sensitive to rebuffs. He seems to have been incapable of any very strong feelings of love or of friendship.[2] But, though this insensibility helped him to pursue his ideals without interruption, it had its dangerous side. It meant that his sense of personal honour was none too keen. It meant that he could somewhat easily take his tone from the society in which he was placed. But the moral tone of the Court was not high. Being unprotected by a keen sense of personal honour, and absorbed in the high ideals of which he never lost sight, he was led to do acts which men of far less lofty ideals, but with a keener sense of personal honour would have instinctively avoided.

It is here that we see the secret of those acts which have weighed so heavily on his memory, and ultimately led to his ruin. In his eyes the service of the state outweighed all his very considerable obligations to Essex,[3] and led him to press home the charge of treason against his warm-hearted friend and benefactor. He was quite unconscious of the growing corruption of James's court, and of the moral worthlessness of his favourites. He was equally unconscious of the growing corruption of the court of Chancery.[4] He knew that he intended to decide cases justly; and, as success came, he grew more and more careless, more and more insensible to the moral character of the practices which went on around him.[5] It never occurred to him that Buckingham's interferences with the cases which were being heard in his court might have an ugly look; and that the presents which he and other officers of the court received were hardly consistent with those high standards of honour which he was in the habit of setting before the newly created judges. No doubt

[1] He was himself conscious of this; writing to Villiers in 1615 of an interview with Ellesmere, he says—"My Lord Chancellor is prettily amended. I was with him yesterday almost half an hour. He used me with wonderful tokens of kindness. We both wept, which I do not often," Spedding, Letters and Life v 245.

[2] "He that hath wife or children hath given hostages to fortune; for they are impediments to great enterprises either of virtue or mischief," Of Marriage and a Single Life; "They do best who, if they cannot but admit love, yet make it keep quarter, and sever it wholly from their serious affairs and actions of life; for if it check once with business, it troubleth men's fortunes and maketh men that they can no ways be true to their own ends," Of Love.

[3] "Be so true to thyself as thou be not false to others, *especially to thy king and country*," Of Wisdom for a Man's Self.

[4] Vol. i 426-428.

[5] That the offices of the court of Chancery were saleable like property he naturally accepted, like every one else, as part of the natural order of things, see vol. i 246-262, 424-425; thus in 1597 he suggested to Egerton that he should resign his reversion of the clerkship of the Star Chamber to Egerton's son, and that Egerton in return should resign to him the post of Master of the Rolls, which he still held, Spedding, Letters and Life ii 62; in 1617 he wrote to Buckingham with reference to a proposal to erect a new office, which would have affected the profits of the Six Clerks, that "the king can no more take away the profits of a man's office than he can the profits of his land," ibid vi 295.



it was, from this point of view, unfortunate that he became Lord Chancellor, and not one of the Chief Justices. The standards of the Chancery were lower than those of the common law courts, because it was a branch of the civil service as well as a judicial court; and it was therefore liable to be infected by the growing corruption of that service. And so Bacon allowed himself almost, if not quite, unconsciously to drift into questionable practices, till the crash came.[1]

The House of Commons, in which Coke and the common lawyers ruled supreme, was naturally not sorry to get evidence of the abuses prevalent in the Chancery. John Churchhill, one of the registrars, was detected in the practice of forging orders of the court. He was determined "not to sink alone;"[2] and, to the astonishment of the House, in the course of the ensuing investigations, accusations of corruption were made against no less a person than the Lord Chancellor.[3] At first he seems to have thought that he could prove his innocence.[4] But, as the case developed, his eyes were at length opened to his position. He saw too late that his conduct, however much it might be palliated, was indefensible. He abandoned the attempt to make a defence, with the idea that, if he made a confession, he might escape a sentence and simply be allowed to resign.[5] But the evidence had been accumulating. The king refused to stop the inquiry;[6] and the House of Lords rightly demanded an answer to the twenty-eight charges which had been formulated. The charges showed Bacon that he could do nothing except throw himself on the mercy of the court.[7]

[1] Two accusations had been brought against Bacon in 1619, one by Lady Ann Blount (S.P. Dom. 1619-1623 52, cix 88; ibid 144, cxv 24-27) and the other by Wraynham (ibid 63, cix 139); but they were proved to be slanders and the petitioners were punished.

[2] "One Churchhill, who was dismissed from the Chancery Court for extortion, is the chief cause of the Chancellor's ruin," Chamberlain to Carleton, S.P. Dom. 1619-1623 238, cxx 38; with a view to remedy this abuse, Williams, Bacon's successor, ordered that the registrars "shall drawe up noe order upon any petition whatsoever unless they shall perfectly know the hand that writes the direction to be either mine owne hand or the hand of one of my four secretaries, or of Richard Goland who writes in my study," Sanders, Chancery Orders i 149.

[3] "The petitions against the Lord Chancellor are too numerous to get through; his chief friends and brokers of bargains, Sir Geo. Hastings, Sir Rich. Younge, and others attacked, are obliged to accuse him in their own defence, though very reluctantly," S.P. Dom. 1619-1623 328, cxx 38.

[4] Spedding, Letters and Life vii 213, 215, 216.

[5] Ibid 240-242—letter to the king of April 21, 1621; ibid 242-245—letter to the House of Lords of April 22, 1621.

[6] Chamberlain wrote to Carleton—"The king sent word to Parliament that he had refused the Lord Chancellor's tender of the Great Seal, and wished them to hear him favourably, but to judge him as they thought fit, if matters prove foul," S.P. Dom. 1619-1623 248, cxx 97.

[7] For the charges and Bacon's answers see Spedding, Letters and Life vii 252-262.

He acknowledged the justice of the sentence passed upon him. But, even while making this acknowledgment, he showed the same moral insensibility that had caused his ruin. He contended that, though the sentence was just, he had always acted as a just judge.[1] He could never see that his condemnation was a fatal bar to any further public employment; and he could confidently leave his name to the "next ages."

I incline, then, rather to the opinion of those who take a more favourable view of Bacon's character, than to the opinion of those who condemn him as one of the meanest of mankind. He was a man of lofty ideals and far-sighted views—too lofty and too far-sighted for his own day; so that though, both as a thinker and as a man of action, he was always using his unique combination of speculative, literary, and practical talents to gain acceptance for them, he failed to do so. But his absorption in these ideals weakened a moral sensibility never very robust. And this fatal defect in his character was aggravated by his continual striving, by the methods then usual, for an office which would help him to realize some of them. The result was that this one grave defect in a man of high character, ripe wisdom, untiring perseverance, and consummate genius, both caused his ruin and has injured his fame with all the succeeding ages.

But it is his best side, both morally and intellectually, that survives in his writings; and it is to some of these that we must turn if we would estimate his position as a jurist, and his work as a chancellor.

*The Jurist.*

No student of English law in the sixteenth century who has read Bacon's published works on subjects connected with the common law would deny that he was in some respects the best lawyer of his day. Whether we look at his tract on the Maxims of the Law, or his reading on the Statute of Uses, or at his legal arguments, we see the same qualities—luminous surveys of the ground, a mastery both of broad principles and of technical details, and, when the subject matter permits, a literary presentment of which no other lawyer was capable. Of his Maxims I shall speak later;[2] and of his reading on the Statute of Uses I have already said something, and

[1] "I was the justest judge that was in England these 50 yeares: But it was the justest censure in Parliament that was these 200 yeares," Works vii 179; it is in substance the position which he took in his letter to the king of March 25, 1621—"And for the briberies and gifts wherewith I am charged, when the books of hearts shall be opened, I hope I shall not be found to have the troubled fountain of a corrupt heart in a depraved habit of taking rewards to pervert justice; howsoever I may be frail, and partake of the abuse of the times," Spedding, Letters and Life vii 226.

[2] Below 398, 489.



shall have occasion to speak again.[1] Some of his legal arguments[2] rise on occasion to real eloquence; and there is much evidence to show that they impressed his auditors by the grace of the speaker's delivery, as much as they impress us to-day by the excellence of their subject matter and their grace of style. It is clear from the evidence of a bystander that his argument in one of his earlier cases showed that a new star had arisen in the legal firmament;[3] and in the *Case de Rege Inconsulto*, which he argued as Attorney-General, he says, "I lost not one auditor that was present in the beginning, but staid till the latter end;" and that, "it pleased my Lord Coke to say it was a famous argument."[4] Ben Jonson's evidence is to the same effect—"His hearers could not cough or look aside from him without loss. He commanded when he spoke, and had his judges angry and pleased at his devotion—the fear of every man that heard him was that he should make an end."[5] He was, as I have said, a man with great ideals; and his work, not only as a philosopher, but also as a statesman, and even as a lawyer, was inspired by them. Hence, in cases like *Calvin's Case* or the *Case de Rege Inconsulto*, which involved some political principle in which he believed, the technical reasoning, by which he supported his argument, was so transfused by his eloquence that laymen as well as lawyers could listen to it with delight.

But the power to produce this result upon the lawyers who were to decide the case demands, not only enthusiasm for an ideal, but also a complete mastery of the technical learning applicable to the question. Bacon's mastery was complete, because he had not only studied the rules of English law; he had also some knowledge of the rules of the Roman civil law, and he had used this knowledge to strengthen his grasp of legal principles, and to acquire some ideas upon the theory of law in general.[6] In other

[1] Vol. iv 467; below 395-396.

[2] The following are his published arguments: The Case of Impeachment of Waste; Low's Case of Tenures; Case of Revocation of Uses; Jurisdiction of the Council of the Marches; Chudleigh's Case; Case of the Post Nati of Scotland; Case de non procedendo Rege inconsulto, Works vii 517-725.

[3] In 1594, Gosnall, a young lawyer of Gray's Inn wrote to Anthony Bacon as follows: "The respect they (the judges) gave him, although it was extraordinary, was well noted but not envied. The attention of the rest . . . could not be better. His argument contracted by time, seemed a *bataille serrée*, as hard to be discovered as conquered. The unusual words wherewith he had spangled his speech, were rather gracious for their propriety than strange for their novelty, and like to serve both for occasions to report and means to remember his argument. Certain sentences of his, somewhat obscure, and as it were presuming upon their capacities, will, I fear, make some of them rather admire than commend him. In sum, all is as well as words can make it, and if it please her Majesty to add deeds, the Bacon may be too hard for the Cook," Spedding, Letters and Life i 268.

[4] Ibid v 235.

[5] Cited Church, Bacon 265-266.

[6] He says in his Preface to the Maxims of the Law (Works Ed. Spedding vii 321) "Whereas some of these rules have a concurrence with the civil Roman law,

words he was one of the few common lawyers of his day who had studied law scientifically. This gave him that power, which we observe in all his writings, of laying down the broad principle applicable to the case in hand, and of grouping his proofs and instances under it in an orderly way. It also gave him the power of making a critical estimate of the strong and weak points of the laws of England. He had a strong admiration for them. "They commend themselves best," he wrote, "to them that understand them; and your Majesty's Chief Justice of your Bench hath in his writings magnified them not without cause. Certainly they are wise, they are just and moderate laws; they give to God, they give to Cæsar, they give to the subjects that which appertaineth." [1] But his admiration had nothing in it of Coke's idolatry. It was the admiration of one who could see their weak side, and, as we shall see,[2] propose well thought out reforms.

Bacon's view as to the theory of law in general, and the manner in which he applied that theory to the English law of his day, are to be found in the ninety-seven aphorisms contained in the third chapter of the eighth Book of the *De Augmentis*. His object, he tells us, was "to set down . . . what may be called certain 'laws of laws' whereby we may derive information as to the good or ill set down and determined in every law." [3] The following summary will show how he fulfilled this object.

In civil society either law or force prevails; [4] and law he later defines as "a commanding rule." [5] The reason for the existence of private law is public utility.[6] The efficacy of private law depends ultimately upon the power of government, by the authority of which the magistrates, who protect private rights,

and some others a diversity, and many times an opposition; such grounds as are common to our law and theirs I have not affected to disguise into other words than the civilians use, to the end they might seem invented by me, and not borrowed or translated from them: no, but I took hold of it as a matter of great authority and majesty, to see and consider the concordance between the laws penned and as it were dicted *verbatim* by the same reason. On the other side the diversities between the civil Roman rules of law and ours . . . I have not omitted to set down with the reasons."

[1] A Pr position to his Majesty . . . touching the Compiling and Amending of the Laws of England, Speddi g, Letters and Life vi 63.

[2] Below 485-489.

[3] Aph. 6—"Leges enim mirum in modum, et maximo intervallo, inter se differunt; ut aliæ excellant, aliæ mediocriter se habeant, aliae prorsus vitiosæ sint. Dictabimus igibur pro judicii nostri modulo quasdam tanquam legum leges; ex quibus informatio peti possit, quid in singulis legibus bene aut perperam positum aut constitutum sit." The translations here and elsewhere are Spedding's.

[4] Aph. 1.

[5] Aph. 83—"Lex enim nil aliud quam regula imperans."

[6] Aph. 2—"Firmamentum juris privati tale est. Qui injuriam facit, re utilitatem aut voluptatem capit, exemplo periculum. Cæteri utilitatis aut voluptatis illius participes non sunt, sed exemplum ad se pertinere putant. Itaque facile coeunt in consensum ut caveatur sibi per leges: ne injuriæ per vices ad singulos redeant."



are maintained.[1] The maintenance of public law, then, is essential to the maintenance of private rights; and further, "it extends also to religion, arms, discipline, ornaments, wealth, and in a word, to everything that regards the well-being of a state." [2] The laws are thus the sinews and the instruments for the maintenance of a peaceful, a prosperous, and a civilized life.[3] But law may prevail, and yet there may be much injustice—"There is a kind of force which pretends law, and a kind of law which savours of force rather than equity." [4] If law is to attain its objects it must have certain qualities. It must be "certain in meaning, just in precept, convenient in execution, agreeable to the form of government, and productive of virtue in those that live under it." [5] Bacon then proceeds to the consideration of these various qualities of a good law; but in fact, he deals only with the first—its certainty. The uncertainty of law, may, he says, arise from one of two causes. Either there is no law dealing with the question, or the law dealing with it is obscure.[6] He first considers various methods by which the absence of law dealing with particular cases can be remedied, such as reference to similar cases,[7] extensive interpretation,[8] precedents,[9] equity criminal or civil,[10] retrospective statutes.[11] He then passes on to various causes for the obscurity of the law. This arises either from the excessive accumulation of laws, from bad draftsmanship, from faulty methods of interpretation or exposition, or from contradictory and uncertain decisions given by the courts.[12]

It is clear that in this last part he has had specially in view the defects in English law. In many places he adapted large parts of the paper which he had previously written to James I. on the compiling and amendment of the laws of England. With this aspect of his work I shall deal later.[13] Here we must note

[1] Aph. 3. [2] Aph 4.

[3] Aph. 5—"Finis enim et scopus, quem leges intueri, atque ad quem jussiones et sanctiones suas dirigere debent, non alius est quam ut cives feliciter degant: id fiet, si pietate et religione recte instituti; moribus honesti; armis adversus hostes externos tuti; legum auxilio adversus seditiones et privatas injurias muniti; imperio et magistratibus obsequentes; copiis et opibus locupletes et florentes fuerint. Harum autem rerum instrumenta et nervi sunt leges."

[4] Aph. 1—"Est autem et vis quædam legem simulans: et lex nonnulla magis vim sapiens quam æquitatem juris."

[5] Aph. 7—"Lex bona censeri possit, quæ sit intimatione certa, præcepto justa, executione commoda; cum forma politiæ congrua, et generans virtutem in subditis."

[6] Aph. 9—"Duplex legum incertitudo; altera, ubi lex nulla præscribitur; altera, ubi ambigua et obscura."

[7] Aph. 11, 12. [8] Aph. 13-20. [9] Aph. 21-31.

[10] Aph. 32-46. [11] Aph. 47 51.

[12] Aph. 52—"Obscuritas legum a quatuor rebus originem ducit: vel ab accumulatione legum nimia, præsertim admixtis obsoletis; vel a descriptione earum ambigua, aut minus perspicua et dilucida; vel a modis enucleandi juris neglectis, aut non bene institutis; vel denique a contradictione et vacillatione judiciorum."

[13] Below 485-489.

in this, as well as in the rest of the work, Bacon lays down universal propositions. They may have been inspired largely by his knowledge of English law; but they are none the less applicable to any civilized body of law. What he has to say as to methods of interpreting statutes, the use of precedents, the question of retrospective laws, the compilation of codes and digests, the necessary books for the understanding of the law, the sphere of lectures and exercises in law, modes of preventing inconsistent judgments, is valuable to the students of all systems of law. And they are all full of the useful wisdom of the thinker who is also a practitioner. Let us take two out of many illustrations. Here is a warning specially applicable to lawyers who work with a system of case law:—"Consequence does not draw consequence, but the extension should stop within the next cases; otherwise there will be a gradual lapse into dissimilar cases, and sharpness of wit will have greater power than authority of law."[1] Here is a correct appreciation of the effect which the discovery of new documentary evidence, in the shape of old records, should have on established legal doctrine, as distinct from legal history:—"Examples which have lain as it were buried in desks and archives and have openly passed into oblivion, deserve less (authority). For examples, like waters, are most wholesome in a running stream."[2]

This small section of the *De Augmentis* shows that Bacon was one of the earliest common lawyers to appreciate the need for some sort of general jurisprudence;[3] and that he was certainly the earliest to show by his precepts how it might be used to improve an existing body of law, and by his example how greatly it facilitated the understanding and exposition of the law. His earlier career had shown how greatly this scientific study of the law had helped him as a reader, as a barrister, and as a writer of books about law. His career as lord keeper and lord chancellor was to show how much it enabled him to do in a short time for the development of the nascent system of equity.

[1] De Augmentis, Bk. VIII. c. 3 Aph. 16—"Consequentiæ non est consequentia; sed sisti debet extensio intra casus proximos: alioqui labetur paulatim ad dissimilia, et magis valebunt acumina ingeniorum, quam auctoritates legum."

[2] "(Exempla) quæ vero in scriniis et archivis manserunt tanquam sepulta, et palam in oblivionem transierunt, minus (auctoritatis). Exempla enim, sicut aquæ, in profluente sanissima," ibid Aph. 28; the application of this principle might perhaps afford some solution to Lord Sumner's query in Palgrave Brown & Son v. S.S. Turid [1922] A.C. at p. 413 as to "what would happen, if some learned and industrious person compiled from the records and cases lodged by the parties in your Lordships' House, and the transcripts of your Lordship's opinions preserved in the Parliament Office, a selection of 'Unnoticed House of Lords Cases.'"

[3] We have seen, above 16-19, that this need was better appreciated by the civilians; for other attempts in this direction made by the common lawyers see below 397-401.



*The Chancellor.*

Bacon's decisions as chancellor are still among the unpublished records of the court, and so we only have very scrappy and very unsatisfactory notes of them.[1] It would no doubt be interesting to see the actual records of these cases. We should be able to see the directions in which Bacon developed equity, we might perhaps discover that he had originated or anticipated some of its later doctrines. But with him, as with the other chancellors of this period, in the absence of reports, we shall never be able to discover how "he directed the evidence, moderated length repetition or impertinency of speech, recapitulated selected and collated the material points of that which had been said, gave the rule or sentence:" nor how he "commended and graced an advocate when the cause was well handled and fair pleaded; how he reprehended when there appeared cunning counsel, gross neglect, slight information, indiscreet pressing, or an over-bold defence."[2] We do, however, know from his own writings a good deal more of his achievement than we know of the achievement of any other chancellor before the beginning of the regular reports.

In the first place, he succeeded in restoring a certain amount of harmony between the common law and the Chancery. No doubt the victory of the Chancery, to which he had largely contributed, had left the common lawyers rather sore. In the speech which he made on taking his seat in Chancery he promised that the issue of injunctions should be carefully regulated;[3] and further, he imitated the example of Sir Thomas More, and invited the judges to dinner to discuss the matter. After dinner, he pointed out that the late controversy had been largely personal;[4] that for the future, "as I would not suffer any the least diminution or derogation from the ancient and due power of the Chancery, so if anything should be brought to them at any time touching the proceedings of the Chancery which did seem to them exorbitant or inordinate, that they should freely and friendly acquaint me with it, and we should soon agree; or if not, we had a master that could easily both discern and rule." At which he says, "I did see cheer and comfort in their faces, as if it were a new world."[5] He was as good as his word. In his orders he carefully provided against the

[1] Mainly in Tothill; for this book see below 276, 277.

[2] Essays of Judicature.

[3] Spedding, Letters and Life vi 182-186: apparently he never printed a copy, and the version we have is probably "drawn up by Bacon from recollection of what he had said," ibid 182.

[4] Above 238 n. 4.

[5] Spedding, Letters and Life vi 198.

abuse by litigants of the power to get injunctions;[1] and it is clear from the reports that his measures had some success, since, during the rest of this period, the Chancery and common law courts ceased to quarrel. And so it may be fairly said that he restored the old relations between the common law courts and Chancery, which was necessary for the efficient working of both sets of tribunals.

In the second place, his speech on taking his seat in Chancery showed that he knew at least some of the weaknesses of the court, and was prepared to reform them. We have seen that he promised to regulate carefully the issue of injunctions. He went on to say that he did not mean to rely too much upon the reports of the masters;[2] that the final decision should always rest with himself;[3] and that the opinions of the judges, when they were called in to advise him, should always be respected.[4] To the suitor he promised a speedy decision after the hearing of the case,[5] and to sit long that the arrears of causes might be disposed of.[6] At the same time he let it be known that he would never make an order till he was satisfied of its justice. There was to be no more cursory making of orders on ex parte applications—a course which led to the spinning out of cases by the necessity for the making of further orders.[7] Further, he promised that all former orders directed to diminish the expense of a suit should be maintained. He would see to it that pleadings and examination were not prolix, that copies should be properly executed, that no new fees should be exacted, that plaintiffs who could not prove their bills should be made to pay larger costs.[8]

Thirdly, he made good his promises by issuing a consolidated

[1] Orders in Chancery nos. 20-28; cp. De Augmentis Bk. viii c. iii Aph. 42-46.

[2] "The fourth point is concerning the communicating of the authority of the Chancellor too far; and making upon the matter too many Chancellors, by relying too much upon reports of the masters of Chancery as concludent," Letters and Life vi 187.

[3] "I will make no binding order upon any report of one of the masters, without giving a seven nights day at the least to shew cause against the report. . . . And I must utterly discontinue the making of any hypothetical or conditional order; that if a master of the Chancery do certify thus and thus, that then it is so ordered without further motion," ibid.

[4] Ibid.

[5] "I am resolved that my decree shall come speedily (if not instantly) after the hearing, and my signed decree speedily upon my decree pronounced," ibid 189.

[6] "I shall . . . add the afternoon to the forenoon, and some fortnight of the vacation to the term, for the expediting and clearing of the causes of the court," ibid 190.

[7] "I have seen an affectation of dispatch turn utterly to delay and length: for the manner of it is to take the tale out of the counsellor at the bar his mouth, and to give a cursory order, nothing tending or conducing to the end of the business . and this is that which makes sixty, eighty, an hundred orders in a cause, to and fro, begetting one another; and like Penelope's web, doing and undoing," ibid 190-191.

[8] Ibid 191-192.



set of Orders, which, to a large extent, fixed the practice of the court till the reforms of the last century. Throughout his life Bacon was a consistent advocate of the codification of the statute law, and of the digesting of case law. This set of Orders was the one piece of codification which he was able to effect.

In January, 1619, he issued 101 Orders dealing with the practice of the court,[1] and in October, 1620, he issued some supplementary Orders, eleven of which dealt with the same subject.[2] The orders of 1619 begin with decrees—how they could be questioned, suspended, and executed.[3] They go on to explain the conditions under which bills would be dismissed;[4] and the conditions under which injunctions and sequestrations, and decrees to corroborate the orders of the Court of Requests or the Provincial Councils, could be got.[5] The duties of the registrars are set out in some detail;[6] and rules are laid down for reference to the masters,[7] and for the drafting of their reports and certificates.[8] Then follow rules of pleading, dealing with bills, answers, demurrers, and pleas.[9] They are followed by rules for the conduct of commissions to examine witnesses,[10] for the taking of affidavits.[11] and for process against those guilty of contempt.[12] Certain applications are enumerated which were not to be granted on petition merely,[13] and special rules are made for the issue of certain kinds of writs.[14] The filing of writs and the enrolment of injunctions is regulated.[15] Special rules are made for the issue of commissions for charitable uses, for sewers, in bankruptcy, and to constitute the court of Delegates.[16] The last three rules deal with pauper litigants, licences to collect money for losses, and the exemplifications of letters patent and other records.[17] The Orders of the following year deal with bills of conformity to compel a composition with creditors,[18] the entry of orders, and further rules as to the issue of licences to collect money for losses. The fact that it was possible to make this comprehensive code is an eloquent testimony to the extent to which the machinery and the procedure of the court had become settled. It is quite clear that a court which had attained this degree of development would soon evolve substantive principles of equity.

Fourthly, Bacon fulfilled his promise to do speedy justice.

[1] Their text will be found in Sanders, Chancery Orders i 109-122; or better in Spedding's Ed. of Bacon's Works vii 759-774.

[2] Sanders, Chancery Orders i 129-131.

[3] Orders 1-12

[4] Orders 13-19

[5] Orders 20-34.

[6] Orders 35-44.

[7] Orders 45, 47, 50, 51, 52, 53.

[8] Orders 46, 48, 49.

[9] Orders 55-67.

[10] Orders 68-74.

[11] Orders 75-76.

[12] Orders 77-79.

[13] Orders 80-83.

[14] Orders 85-89.

[15] Orders 90-92.

[16] Orders 94-97; for the court of Delegates see vol. i 603-605.

[17] Orders 98-100.

[18] On this matter see above 139 and n. 13; Vol. viii 244-245.

A month after he had taken his seat in Chancery he could write to Buckingham, "This day I have made even with the business of the kingdom for common justice. Not one cause unheard. The lawyers drawn dry of all the motions they were to make. Not one petition unanswered."[1] And in December of the same year he was able to make the same boast.[2] Nor is there any evidence that the quality of justice dispensed was unsatisfactory. It is true that he was by his own confession too ready to take presents from suitors. It is true that in at least one case he allowed Buckingham's influence to pervert the course of justice.[3] But it is probable, on the whole, that the presents which he took did not prevent him from deciding as he would otherwise have decided. At least we do not hear that any large number of his cases were reversed by his successor.

It may be fairly said, therefore, that Bacon left his mark upon the court of Chancery. As attorney-general he had been largely instrumental in vindicating the independence of the court, and in thus securing the free development of equity. As chancellor he helped to restore harmony between the Chancery and the courts of common law; and he created from the scattered orders of his predecessors a code of procedure, the formation of which was a condition precedent to the development of a system of equity. Thus he consolidated and completed the work of that school of lawyer chancellors which had come with the chancellorship of Sir Thomas More. That the development of a system of equity did not make rapid way till after the Restoration was due wholly to political causes.

With the interlude of Bacon's successor, bishop Williams, I have already dealt.[4] His successor Coventry was a lawyer, and carried on the business of the court on the lines which Bacon had laid down.

Thomas Coventry "was a son of the robe, his father having been a judge in the court of common pleas."[5] His rise was rapid. He became recorder of London in 1616 at the age of thirty-eight, in spite of Bacon's opposition, which seems to have been grounded upon his friendship with Coke.[6] But he soon

[1] Spedding, Letters and Life vi 208.

[2] Ibid 283; on the other hand it would appear that this pace had not been fully maintained; in 1619 Chamberlain wrote to Carleton that "The Lord Chancellor's slackness causes a rumour that he is to have a Lord Keeper as a coadjutor," S.P. Dom. 1619-1623, 39, cviii 69; of course this may have been due to illness or to some other temporary cause.

[3] See Mr. Heath's elaborate analysis of the case of Dr. Steward, Spedding, Letters and Life vii App. 579-588.

[4] Above 226-227.

[5] Clarendon, History of the Rebellion (ed. 1843) 19.

[6] "The man upon whom the choice is like to fall, which is Coventry, I hold doubtful for your service; not but that he is well learned and an honest man, but he hath been bred as it were by Lord Coke and seasoned in his ways," Spedding, Letters and Life vi 97.



proved that Bacon's suspicions were groundless. Whatever his earlier opinions may have been, he soon became a royalist in politics. He was made solicitor-general in 1617, attorney-general in 1621, and lord keeper in 1625. Though he was a believer in a strong prerogative, he was by no means a pliant courtier. He persuaded Charles I. to assent in regular form to the Petition of Right,[1] he advised against the dissolution of the Parliament in 1629,[2] and he did not hesitate to oppose Buckingham's arrogance.[3] It is true that he approved of the levy of ship money; but he took little active part in Charles's eleven years of prerogative rule. If he intervened it was on the side of moderation.[4] "He was seldom known to speak," says Clarendon, "in matters of state, which, he well knew, were for the most part concluded, before they were brought to that public agitation; never in foreign affairs."[5] And so, unlike most of Charles's ministers, he both retained his office, and yet was esteemed by the people.[6] He died in 1640, just after the writs for the Short Parliament had been issued. His last message to the king was a plea for patient forbearance with that Parliament—he advised the king, "to take all distastes from the Parliament summoned against April with patience, and suffer it to sit without an unkind dissolution."[7]

The attention which Coventry gave to the business of the court is seen by the numerous Orders which he issued. Some of them were merely temporary. Thus we have several in 1636 dealing with the dislocation of business caused by the plague.[8] There are very many made to regulate the duties of and fees payable to various officers of the court. Some of those duties and fees seem to have still been very badly defined; and Orders were still necessary to prevent officials from poaching upon one another's domains.[9] In 1638, with a view to the settlement of this question, the king ordered juries to be impanelled from the

[1] Foss, Judges vi 280.

[2] Gardiner vii 77.

[3] Foss, Judges vi 280.

[4] Thus he with the Chief Justices took a lenient view in Sherfield's case, Gardiner vii 257; and in 1627 he resisted the attempt of the Council to treat a refusal to take press money as punishable by martial law, ibid vi 156-157.

[5] Op. cit. 19.

[6] He had, says Clarendon, op. cit. 53, "a rare felicity, in being looked upon generally throughout the kingdom with great affection, and a singular esteem, when very few other men in any high trust were so."

[7] Hacket, Life of Williams ii 137.

[8] Sanders, Chancery Orders i 193-196.

[9] Ibid 137-161; 163, 164; 168-170; 171-173; 184-188; 189-191; 191-193; 197, 198; 200-202; 202-204; it would appear that parties were in the habit of paying masters and others for their reports, see Monro, Acta Cancellaria 209; but this was prohibited by 1 James I. c. 10.

officials and clerks of the various courts to enquire into fees taken during the past thirty years.[1] Many of his Orders relate to procedure; and the fact that it was necessary to issue them showed that Bacon's Orders had not been observed. In fact, as I have said,[2] the chief reason why the abuses of the court of Chancery were not remedied was not want of will, but want of power. Several Orders were directed against the abuse of setting down causes for hearing out of their turn.[3] Other Orders dealt with the abuse of writs of privilege,[4] with the issue of commissions to examine witnesses,[5] with the abuse of issuing process of contempt against persons who had no notice of any previous process.[6] In 1635 came a new series of thirty-one Orders.[7] Instructions as to their duties were given to the Six Clerks, the Registrars, the Masters, and the clerks of the court, with the object of reducing the length and cost of the Chancery procedure. With the same object, an attempt was made to check prolixity in pleading, and the examination of witnesses upon irrelevant matters. Rules were laid down for the hearing of demurrers, motions, petitions, the issue of injunctions, and suits in forma pauperis. Counsel were ordered to see to it that they did not demur for trivial causes, that they made no motion without substantial grounds, that they did not sign a pleading unless they had drawn or perused it, that they did not inform the court as to facts on the mere authority of solicitor or client without perusing the record of the case.

These Orders show that Coventry was well aware of the abuses of the court and intended to remedy them; and they might have effected some permanent reforms if the Great Rebellion had not intervened. They show that he was an able judge—understanding, says Clarendon, "the whole science and mystery of the law;"[8] and he worked well with the judges of the common law courts.[9] But the collapse of Charles's attempt at prerogative government was for the time being fatal to the court of Chancery. Coventry's immediate successors were not in a position to effect anything for the improvement or development of the equitable jurisdiction.

The choice which Charles made of a successor to Coventry showed that he had no intention of acting upon Coventry's last piece of advice. He appointed Finch,[10] the chief justice of the

[1] Sanders, op. cit. i 204-205. [2] Vol. i 428.
[3] Sanders, Chancery Orders i 154, 206-207; similar orders have been made by Williams, ibid 134-135, 147-148.
[4] Ibid 162; for a similar order by Williams, see ibid i 151-152.
[5] Ibid 164-165. [6] Ibid 165-166. [7] Ibid 176-184.
[8] Op. cit. 19. [9] Ibid.
[10] For some further account of Finch see below 343-344.



Common Pleas, who was, owing to his judgment in the *Case of Ship Money*, one of the most unpopular men in England. During his short tenure of office he distinguished himself by the astonishing ruling that he should always consider an order of the Council to be a sufficient ground for making a decree in equity.[1] The year after his appointment (1641) he fled the country to escape condemnation by the Long Parliament. His successor was Edward Littleton—the friend of Selden.[2] He had succeeded Finch as chief justice of the Common Pleas—a position for which he was admirably suited; and on Finch's flight was made lord keeper—a position for which he was most unsuitable.[3] He was a moderate man, and the king suspected his loyalty. But he finally decided to throw in his lot with the king, and retired with the great seal to York in 1642. He died in 1645. His successor was Richard Lane, who had so ably defended Strafford that the Commons abandoned their impeachment, and had recourse to an act of attainder. He retained his title during the rest of the king's life; and died an exile in 1650.

By the middle of the seventeenth century it had thus become obvious that the head of the court of Chancery must be an English lawyer; and, seeing that those who practised before the court had also been educated in English law, it had become clear that there would be no great infusion of the rules of the civil law by way of the court of Chancery.[4] But in the preceding period, when the chancellors were ecclesiastics, the masters of the court had naturally been canonists or civilians. The canonists disappeared after the reign of Henry VIII.[5] But, all through this period, a large proportion of the masters still continued to be civilians,[6] and often sat on the bench with the chancellor as his assistants.[7]

The fact that some of the masters thus continued to be civilians was due to three causes. In the first place, we have seen that the civilians, who had studied their law and taken their degree of Doctor at Oxford or Cambridge or elsewhere, had

[1] "Upon a demurrer put in to a bill before him, which had no other equity in it than an order of the lords of the council, (he said) that whilst he was keeper no man should be so saucy to dispute those orders, but that the wisdom of that board should be always ground enough for him to make a decree in Chancery," Clarendon, op. cit. 30. [2] Below 376.
[3] Clarendon, op. cit. 228, tells us that he lamented his own position—"that he had been preferred from the Common Pleas, where he knew both the business and the persons he had to deal with, to the other high office he now held, which obliged him to converse and transact with another sort of men, who were not known to him, and in affairs which he understood not, and had not one friend amongst them, with whom he could confer upon any doubt which occurred to him."
[4] Vol. iv 276-283. [5] Above 222-223; vol. i 592, 594.
[6] This is clear from the lists given in Foss, Judges vols. v and vi.
[7] Spence, Equitable Jurisdiction i 383 and n. *d*.

formed a professional association which developed into the Doctors Commons of later days.[1] It took the place of the Rolls House, which Lambard tells us had long been the "College of the Chancery men;"[2] and as we have seen, came to be to them very much what the Inns of Court were to the English lawyers. It could therefore supply a succession of trained civilians; and this helped to keep up the tradition that the post of master should go to a civilian. It would seem that these civilian masters continued to practise in the ecclesiastical courts, and presumably also in the court of Admiralty.[3] In the second place, the Chancery, in its character of a secretarial and administrative department, had always needed the help of civilians. We have seen that in the past the ordinary forms of writs had owed something to their powers of legal draftsmanship;[4] and their usefulness in secretarial work was recognized at this period.[5] In the third place, the court of Chancery needed advisers who knew something of the civil law. Their advice was useful in mercantile cases;[6] and more especially was it useful in cases turning upon wills of personalty, legacies, and administration of assets, which were being brought in increasing numbers before the court of Chancery.[7] Such cases were governed by the law administered in the ecclesiastical courts, which was based on the conceptions of the civil law. In these cases the equity administered by the chancellor was obliged to start from the basis of the civil law, just as in cases governed by the common law it was obliged to start from the basis of that law; for the application of conscience or equity "must always be grounded on some law;"[8] and "the

[1] Vol. iv 235-237. [2] Archeion 67.

[3] Monro, Acta Cancellaria 410—a reference ordered in a case as to the validity of a will, "to Mr. Doctor Harveye, and Mr. Doctor Clerke, and Mr. Doctor Hamonde, Masters of this Court (so that neither of them have been counsel in the cause with either side)."

[4] Duck, op. cit. ii 8. 3. 11, cited vol. ii 228 n. 5.

[5] "Forasmuch as all writinges, which passe the Great Seale are under the governance of the lord chauncellor; but the care of composinge and examininge the same appertayned to the masters, that is to say, all things that concearne the distribution of lawes amongst subjects and forrainers, the discussinge and orderinge of the king's revenewe and patrimony, the authentique publishing of leagues and treaties with forraine states and princes," Treatise of the Maisters (Harg. Law Tracts) 309; for this Tract see below 272.

[6] Monro, Acta Cancellaria 439.

[7] Ibid 499—They are to certify as to the civil law in a case concerning the liability of the executor of an executor to pay a legacy; ibid 618—as to whether, according to civil law, a legacy was conditional or absolute; ibid 672-674—a case turning on the construction of a will in which the judges are to be consulted on some of the points, while the masters are to be consulted on the points "which concern their law."

[8] Norburie, The Remedies and Abuses of Chancery (Harg. Law Tracts) 445; vol. iv 280; the writer of the Observations concerninge the office of Lord Chancellor 37, after saying that they were generally civilians, adds, "but surely they have bin heretofore such as have been expert in the course of the Chancery, and skilful in the Lawes of the Realme."



first question that the judge should propound is to know what the law holdeth concerning the point, and upon what strain it is brought into this court."[1] Conversely, and upon the same principle, it was found necessary occasionally to appoint a common lawyer to the post of master of Requests.[2] Moreover the identification, often made at this period, of the equity of the chancellor with the Jus Prætorium tended to connect it more closely with the civil law than with the common law. This last reason for appointing masters from among the civilians is insisted on by the person who wrote, "The new additions of the cheefe Courts in England" in the third edition of Sir Thomas Smith's book de Republica Anglorum,[3] and by other writers.[4] But it should not lead us to take an exaggerated view of the influence of the civil law upon the development of equity. The statement that there is an analogy between the relations of jus civile and jus prætorium on the one side, and common law and equity on the other, furnishes no ground for large inferences as to the subject matter of the rules of equity.

I have already given an account of some of the civilians who held the post of master in Chancery.[5] Of the others we must mention Matthew Carew,[6] distinguished for the quaint wording of some of his reports;[7] his nephew George Carew, the compiler of Cary's reports;[8] Tyndal, a master somewhat apt to shirk difficult work, and noted for his tragic murder by a disappointed litigant;[9] Benet, the judge of the Prerogative court who was impeached and condemned for corruption;[10] Hayward, the historian of Elizabeth's

[1] Norburie, op. cit. 444.

[2] It is stated in the additions to the third Ed. of Smith, De Republica Anglorum (vol. iv 210) at p. 167 (Alston's Ed.) that "the judges in this Court are the Maisters of Requests, one for the common lawes, the other for the civill lawes"; but the lists given by Mr. Leadam, Select Cases in the Court of Requests (S.S.) cii-cxxiv hardly bear this out; however Lambard, Archeion 227 says that "Two Doctors, and two Common Lawyers have bin many times known to have sitten heere together."

[3] "The six Masters are assistants to the Court, to shew what is the equity of the civill law, and what is conscience," at p. 155; all other writers put the number of the Masters at twelve.

[4] "To the Court of Chancery they (the kings of this realm) have assigned the Professors of the civil law, for that a great sort of the titles of that law are titles of Equity, as whatsoever is *Jus Prætorium* or *Jus Editum* (*sc.*) with them is matter of Equity, so that they may seem best able for their skill in these titles, for the which no other law hath the like, to assist the Lord Chancellor in matters of Conscience," The Practice of the Court of Chancery Unfolded 69; cp. Ridley, View of the Civil and Ecclesiastical Law (4th ed.) Pt. IV. c. 3 pp. 394-395; Observations Concerning the Office of Lord Chancellor 36-37.

[5] Above 6-8. [6] Monro, Acta Cancellaria 2 *n.*

[7] Ibid 73, 77, 81, 82. [8] Ibid 29 *n.*

[9] Ibid 32 *n.* 97 *n.*, "After a somewhat extended acquaintance with Sir John Tyndal, it is difficult not to perceive that, with all his excellencies, he is much inclined to throw off on others the duty imposed on *him*"; for illustrations of this characteristic see ibid 97, 130, 162, 207; for the report which caused his murder see ibid 236-238.

[10] Ibid 95 *n.*

reign.[1] The reports which these masters made on the matters referred to them often let us see more of their personality, than we can see of the personality of the chancellors from the formal decrees and orders of the court. We see them bothered by clamorous litigants,[2] and trying to pass difficult or distasteful work on to some one else.[3] They use strong language of counsel who carp at their reports,[4] who promote litigation,[5] or who needlessly lengthen suits.[6] They sometimes put their findings into quaint and colloquial forms. As we have seen, Mathew Carew was specially noted for this.[7] But he did not stand quite alone. On one occasion Tyndal reported, "I know not what opinion to be of, but that poor fly is fallen into the spider's web."[8] On another occasion Sir Charles Cæsar reported that a certain litigant, having refused to perform a decree, said, by way of excuse, that his counsel had never been heard; and "touching the fury of his words, he hopeth they are less to be weighed in regard he is a soldier."[9]

Though, as I have said, the greater number of the masters continued, throughout this period, to be civilians, there were occasional exceptions. William Lambard,[10] the scholar, antiquary, and constitutional lawyer is a notable example. And in the case of the chief of the masters—the master of the rolls—the common lawyers were beginning to encroach. Southwell, created master of the rolls in 1547, his successor Beaumont, created in 1550 and dismissed for forgery and embezzlement in 1552, and Cordell, who held the office from 1557-1581, were all common lawyers; and Cordell's successors, Gerard and Egerton, had held the post of attorney-general. James I. broke this succession of English lawyers by appointing, in 1603, Lord Kinloss, a senator of the College of Justice in Scotland. But he was succeeded by a

[1] Monro, op. cit. 255 *n.*

[2] Ibid 78, 79, Masters Hone and Amye report that "At our meeting the plaintiff's father and the plaintiff's counsel were exceeding vehement in words; but not so well instructed as was fit. . . . The defendant's examinations are long and cautelous, and the defendant himself hath been exceeding tedious, in often reading many leaves together impertinently; and besides clamorous in charging the plaintiff with unjust vexations;" cp. ibid 113.

[3] Ibid 14-15, 97, 113; in the first cited case Masters Lambard and Hobarte report that the case is so tedious and so hinders other business that the Court should order the parties to choose some fit persons, "which, remaining here after term ended, and being assisted with one skilful auditor, may, at convenient leisure, and with good eyes, look into the estate of this whole reckoning."

[4] Ibid 111.

[5] Ibid 85, Master M. Carew says—"finding by what injurious policy it hath heretofore been sought to draw excessive gain from clients by exasperating with bitter words their minds one against the other."

[6] Ibid 78, cited above n. 2; 253.

[7] Above 259 n. 7.

[8] Monro, op. cit. 203.

[9] Ibid 265.

[10] Vol. iv 117-118.



serjeant at law—Sir Edward Phellips, whom Norburie[1] credits with the attempt to shorten Chancery proceedings by abolishing as far as possible, all references to masters and others. After him came two civilians—Sir Julius Cæsar,[2] and his son Sir Charles Cæsar;[3] and two persons who were neither common lawyers nor civilians—Sir Dudley Digges[4] and Sir John Colepeper.[5] Perhaps this was in part due to the influence of Laud. Clarendon tells us that he prevailed with the king to direct that "half the Masters of the Chancery should be always civil lawyers, and that no others, of what condition soever, should serve him as Masters of Requests.[6]" Clarendon shows clearly the political folly of this advice;[7] and it is clear that legally it was equally objectionable.[8]

We shall see that the victory of the common lawyers, won (Clarendon said) by the "fury and iniquity of the time," was more permanent than he thought; and that in the following period they managed to "stand upon the ground which they had won," and "to wear some of the trophies and spoils they had ravished from the oppressed."[9] Comparatively few of the masters continued to be civilians, and the post of master of the rolls came to be always filled by an English lawyer.[10]

## *The Literature of and the Authorities for the Early Rules of Equity*

We can see from the early history of the common law that it is not until the courts have begun to make rules of substantive law that we get any great mass of legal literature. Till then the

[1] The Remedies and Abuses of the Chancery (Harg. Law Tracts) 429, 447—"I sitt not here to referr causes; they might have done that before they came hither: now they are here they shall know their doome."

[2] 1614-1636.

[3] 1639-1642.

[4] 1636-1639.

[5] 1643-1649.

[6] History of the Rebellion 122.

[7] "I believe experience hath now manifested, that though many of the common lawyers have much indiscretion, injustice, and malice to repent of towards the church, the professors of the civil law have not been less active . . . in the unnatural destruction of their mother. . . . It will be no ill measure in making friendship, to look into the power of doing hurt and doing good. And it was apparent that the civil law in this kingdom could neither help or hurt the church in any exigent . . .; whereas the professors of the other had always by their interests, experience, abilities, and reputation, so great an interest upon the civil state, upon court and country, that they were notable friends or enemies," op. cit. 123.

[8] Above 259.

[9] "And I cannot but say, to the professors of that great and admirable mystery the law . . . who seem now, by the fury and iniquity of the time, to stand upon the ground they have won, and to be masters of the field: and, it may be, wear some of the trophies and spoils they have ravished from the oppressed; that they have yet but sharpened weapons for others to wound themselves; and that their own eloquence shall be applied to their own destruction," Clarendon, op. cit. 123.

[10] Sir Henry Powle, Master of the Rolls 1689-1692, Foss, Judges vii 340-343, Dict. Nat. Biog., was rather a politician than a lawyer, but even he was a barrister and bencher of Lincoln's Inn.

main authorities are the records of the courts themselves and their rules of procedure. In the twelfth century the records of the Curia Regis and Glanvil's book, which deals mainly with its procedure, are the chief authorities for the origins of the common law.[1] It is not till the thirteenth century that we get more important books,[2] and the beginning of regular law reports.[3] It is the same with authorities for the early history of equity. Before the sixteenth century the chief authorities are the records of the court, and a few short orders made by the chancellors, dealing with the organization and the procedure of the court. It is not till the sixteenth century that we get one or two books written about the substantive rules of equity; and some of them are controversial tracts written to attack or to defend equitable interferences with the common law. It is not until the middle of the seventeenth century that reports of cases decided in the court of Chancery begin to get into print.

In dealing with this subject therefore, I shall describe (1) the Records; (2) the Orders of the Court; (3) the Treatises and Tracts; and (4) the Reports.

(1) *The Records.*[4]

The records of the court of Chancery fall into several distinct classes. The following is a list of those which are the most important from the point of view of legal history :—

(i) *The Chancery proceedings.*[5] These consist of Bills, Answers, Depositions, and other proceedings in Chancery. They are in three series. (*a*) From Richard II. to Philip and Mary. The basis of division is the succession of Chancellors. They are arranged chronologically under each chancellor. (*b*) From Elizabeth to Charles I. The basis of division is the succession of kings. They are arranged alphabetically according to the names of the plaintiffs reign by reign. (*c*) After Charles I. to 1842, when the Six Clerks were abolished, there is a most complicated and inadequate arrangement, based on the division of business among the Six Clerks. It is complicated because it involves an arbitrary sixfold division. It is inadequate because the chronological and alphabetical principles upon which it is based are not adhered to, with the result that there is no certainty that any given paper will be found in its right bundle, or under its right alphabetical heading. The details of this extraordinary arrangement will be

[1] Vol. ii 185-186, 190-192.
[2] Ibid 236-243, 319-322.
[3] Ibid 525-526.
[4] My authority for this section is chiefly Scargill-Bird's Guide to the Public Records 8-85.
[5] Ibid 48-53.



found in Mr. Scargill-Bird's Guide.[1] As is there pointed out, some help in searching these records may be found in the bill books, cause books, and clerk in court's book—all connected with the Six Clerks' office, and with the work of the sworn clerks.[2]

Of these Chancery proceedings a few extracts have been printed. The old Record Commission printed in three volumes the calendars to the Chancery proceedings in the reign of Queen Elizabeth; and to the first two of these prefixed a selection of the older cases in extenso. The Selden Society have printed the earliest cases, between 1383 and 1412, not printed by the Record Commission; and a selection of later proceedings, which range in date between 1364 and 1471. Mr. Trice Martin has printed some further cases from the fifteenth century.[3] It is clear that these proceedings are of primary importance for the early history of equity. W. T. Barbour's essay on the History of Contract in early English Equity[4] shows how much light they shed upon the doctrines actually applied by the chancellor. But their bulk is so large that it can hardly be expected that they will ever be printed in their entirety. It seems to me that good service would be done if a selection dealing with specific heads of equity could be published, and if, in making these selections, preference were given to those cases in which a decree was made. The ex parte statements in Bills and Answers are useful illustrations in default of better evidence; but the litigants of this period never allowed the truth to stand in the way of the production of a picturesque effect. W. T. Barbour's Essay, and the Appendix of documents annexed thereto, show the kind of use to which such selections made on such a plan could be put. And the adoption of such a plan would at least give a much needed principle of selection. A miscellaneous mass of extracts made on no ascertainable principle, is difficult to use; and there is not the same security that the editor has not overlooked important cases. To search a mass of material with one definite object in view is both

[1] Scargill-Bird, op. cit. 48-50; see ibid 51-53 for the existing Record Office lists and indexes.
[2] Ibid 51-52; the *Bill Books* range from about 1673-1852. They "contain entries of all the Bills filed in Chancery arranged alphabetically year by year, the names of the Six Clerks and clerks in Court who appeared for the plaintiffs being given in the margin, thus enabling the searcher to refer to the division in which the Records should be indexed"; the *Cause Books* range from about 1620-1842. "Each of the Six Clerks kept in his study a book called the Cause Book," in this was entered the names of the parties and the dates of their several pleadings, the entries being made alphabetically under the Plaintiffs' names; the *Clerk in Court's Books* range from about 1713-1842. They were books kept by the clerks in court in which were entered the dates of appearance and other proceedings.
[3] Some Chancery Proceedings of the Fifteenth Century (1904); Clerical Life in the Fifteenth Century as illustrated by Proceedings of the Court of Chancery, Archæologia (Second Series) vol. x Pt. II. 353-378.
[4] Oxford Studies in Social and Legal History vol. iv.

easier and more satisfactory than to search it with several less definite objects.

(ii) *The Entry Books of Decrees and Orders.*[1] These books were kept by the registrars of the court. They run from 36 Henry VIII. to 1885. They are in two series—Liber A and Liber B. The Liber A series runs from 36 Henry VIII. to 1629, and contains decrees and orders alphabetically arranged under the plaintiff's name from A to Z; after that date it contains the decrees and orders similarly arranged from A to K. The Liber B series runs from 1 Edward VI. to 1629, and contains decrees and orders alphabetically arranged from A to Z; after that date it contains decrees and orders similarly arranged from L to Z. General Orders are indexed under the letter O. Generally each book contains four terms; but in the earliest books there are variations.[2] Some interesting extracts from these books have been printed by Monro in the second part of his Acta Cancellaria. We ought to have more of them. A series of extracts down to the Restoration would be very useful.

(iii) *Reports and Certificates.*[3] These are a collection of reports made by the masters, from 1544 to the abolition of the masters in 1848. After that date their place is taken by the reports of the chief clerks and taxing masters. They comprise 4,108 volumes arranged alphabetically term by term. A valuable selection of these reports from the reigns of Elizabeth and James I. has been printed by Monro.

These are perhaps the most important classes of records from the point of view of legal history. But they are not by any means the only classes. Thus we get decree rolls on which were entered all such decrees as were solemnly enrolled;[4] registrars' court or minute books, consisting of notes taken in court by the registrar with minutes of the court's decision;[5] and Chancery masters' documents consisting of affidavits, accounts, and other evidence on which they grounded their reports.[6]

[1] Scargill-Bird, op. cit. 53; for a fuller description see T. Kennedy, Code of Chancery Practice (ed. 1845) 111-116; Monro, Acta Cancellaria, Pref.; in Legal Judicature in Chancery, at p. 151, a note of Sir Julius Cæsar on a decree roll of 31 Henry VIII. is cited to the effect that, till 36 Henry VIII., the decrees were not enrolled, but the history of the case was shortly noted on the back of the bill in Latin, according to the usual practice of the civil and canon lawyers.

[2] Kennedy, op. cit. 111-116.

[3] Scargill-Bird, op. cit. 55; Monro, Acta Cancellaria, Pref.

[4] Scargill-Bird, op. cit. 54. The object of enrolment was "generally in order to render the record of the judgment more solemn and authoritative, any appeal against such Decrees or Orders having then to be made to the House of Lords."

[5] Ibid 55. "They are arranged in Terms, there being generally one volume per Term for each Registrar, for which reason they are sometimes designated 'Term Books'."

[6] Ibid 56.



(2) *The Orders of the Court.*

The Orders of the Court are the best evidence of the organization of the court and of its rules of procedure. In other words they furnish us with a picture of the machinery which created the substantive rules of equity. These Orders stretch in a continuous series from 1388 down to the Judicature Acts. They are very various in their character, and must be sought in different places. I have already mentioned some of the more important general Orders issued by the chancellors of this period.[1] But these general Orders by no means exhaust the whole body of Orders of the court. Some of them were never published as Orders, but were made in the course of the hearing of a cause. "They are made in private causes; but the Court, while deciding on the point before it, lays down a rule which it declares shall in similar cases be observed in future. Such Orders are entered in the Registrar's Book under the title of the private cause only; but the words 'Ordo Curiæ' are inserted in the margin, opposite to that part which is intended for the guidance of the public."[2] Others were made, not by the chancellor or the master of the rolls, but by the Six Clerks, and approved by the chancellor. As Sanders, referring to these orders, says,[3] "It is evident from the beginning there was something wrong with the constitution of the office of the Six Clerks. . . . Endless misunderstandings among themselves and with their superiors, quarrels respecting fees, encroachments upon the rights of other offices, and violence and insubordination in their servants and clerks, are conspicuous through the whole of their earlier history." We have seen that with the growth of the court it became impossible for them to fulfil their original function—that of acting as the attorneys to the parties.[4] They came to be so useless a clog in the cumbersome machinery of the court that even Lord Eldon's commission was unable wholly to approve of them.[5]

It will thus be seen that the growth of the Orders of the Court was somewhat haphazard. They were made by different authorities; and the necessity to repeat some of them shows that their enforcement was difficult. This was due, as I have said, partly to want of power and knowledge on the part of the chancellor, and partly to the vicious system under which the offices of the court were regarded as property, with which it was wrong to interfere.[6] But it was also due to the ease with which it was possible for all concerned to forget Orders which had been made, owing to the absence of any official record. "The origina.

[1] Above 228, 230, 232, 253, 255-256.

[2] Sanders, Chancery Orders i Pref. xii.

[3] Ibid xvii, xviii.

[4] Vol. i 421-422.

[5] Ibid 443.

[6] Ibid 424-428.

Orders of Court," says Sanders,[1] "are neither filed nor officially preserved. . . . As regards some of them (and those among the most important), neither are they preserved, nor is any entry of them made in the Registrar's books. Those of early date are probably for ever lost; and those of more recent date exist only by accident, and in private repositories, where they are, not unfrequently, forgotten, and where, at least, they are not available for immediate reference. . . . The little attention which the Court has paid to the preservation of its General Orders, and to the means of obtaining a ready reference thereto, creates, perhaps, more surprise than anything else in its history."

The most complete edition of these Orders, and the only edition which is useful for historical purposes is that by G. W. Sanders, published in 1845.

(3) *The Treatises and Tracts.*

The treatises and tracts which deal with the development of equity in this period are few in number; and the only one of first-rate importance is the Dialogue of the Doctor and the Student. Of the rest, some are mainly controversial; and others are chiefly occupied with the office of the chancellor, with his court, and with its jurisdiction and procedure. I shall deal with this literature under these heads.

*The Doctor and Student.*

The author of the two Dialogues between the Doctor of Divinity and the Student of the common Law was Christopher St. Germain, a barrister of the Inner Temple, who lived from about 1460-1540.[2] He was well read both in English law, and in the literature of the canon law; and he took a keen interest in the religious controversies of his time. His attitude was that of "a moderate reformer;" and the adoption of this attitude brought him into a controversy with Sir Thomas More, in the conduct of which More's stern orthodoxy caused him to lose his usual urbanity. St. Germain's studies in the canon law, and his knowledge of English law,[3] naturally led him to interest himself in the development of equity, which, up to this time, had been closely connected with the canon law, because it had been mainly developed by the ecclesiastical chancellors.[4] He was able to

[1] Sanders, op. cit. i Pref. xv; as we have seen, vol. ii 427, 532-536, neither the statutes nor the law reports have ever been officially collected.

[2] Dict. Nat. Biog.

[3] Sir Paul Vinogradoff says, Reason and Conscience in Sixteenth Century Jurisprudence, L.Q.R. xxiv 374, that St. Germain is "quite at home in the legal learning of the Courts, and very well read in the philosophical and jurisprudential writings of his time."

[4] Above 217.



look critically at the rules of English law, and, with the help of his knowledge of the canon law, to point to those parts of it which needed the help of equity if it was to fulfil the main object of law—the furtherance of justice and the promotion of virtue.

The first Dialogue was first published in Latin in 1523, but no copy of this edition is known to exist.[1] It was reissued in 1528. The second Dialogue was published in English in 1530, and the first Dialogue was revised and published in English by the author in 1531. These English editions were republished with additions in 1532, and there have been very numerous subsequent editions.[2] The English version of the first Dialogue is not a mere translation. Disquisitions upon and references to the canon law, which would be useless or unmeaning to English lawyers, were omitted; and therefore, as Sir Paul Vinogradoff has pointed out, from the point of view of the early history of equity, the Latin version is the most valuable. "It puts clearly before us the elements of the author's learning and the thread which connects him with his predecessors."[3]

I have already said something of the sources from which the author drew his learning, and of the manner in which he applied it to explain the theory which underlay the administration of equity by the mediæval chancellors.[4] At this point I must deal with the importance of the book in the later history of the development of equity. That its importance was great can be seen from the fact that it is cited by practically every writer upon equity down to Blackstone's day.[5] The reasons why it was so important were, I think, somewhat as follows:

Firstly, the English version of the first Dialogue put into a popular and an intelligible form the current learning of the canonists as to such fundamental legal conceptions as the nature and objects of law, and the different kinds of law and their respective functions.[6] This enabled the author to explain in an equally intelligible way the principles underlying the canonist view as to the necessity and the reason for the existence of equity.[7] We have seen that, according to that view, equity was needed to cure the injustice caused by the generality of the law. "Since the deeds and acts of men, for which laws have been ordained, happen in divers matters infinitely, it is not possible to make any general rule of law, but it shall fail in some case."[8]

[1] Dict. Nat. Biog. [2] For these see ibid.

[3] Reason and Conscience in Sixteenth Century Jurisprudence, L.Q.R. xxiv 374, 377.

[4] Vol. iv 275-276, 279-281. [5] Vinogradoff, op. cit. L.Q.R. xxiv 373-374.

[6] Above 216. [7] Ibid; vol. iv 276, 279-280.

[8] Doctor and Student i c. 16, cited vol. iv 280 n. 3.

But what principle should be applied to rectify the injustice so caused? The canonists, as Sir Paul Vinogradoff has pointed out, found a guiding principle in conscience. Conscience must decide how and when the injustice caused by the generality of rules of law was to be cured. It is, so to speak, the executive agent in the work of applying to individual cases the dictates of the law of God or reason.[1] And it is the emphasis laid by the canonists on conscience, which differentiates the equity administered by the ecclesiastical chancellors of the fifteenth century, from the equity which, in the thirteenth and early fourteenth centuries, had been administered by the common law courts.[2] St. Germain's popular exposition has made these canonist principles the basis and starting point of English equity.

Secondly, the time when the book appeared was extraordinarily opportune. It came at the close of the period during which the court of Chancery had been presided over by ecclesiastical chancellors, and at the beginning of the period when its development was to be guided by the common lawyers. Thus it helped to promote a larger amount of continuity in the development of equity than would otherwise have been possible. It enabled the new school of chancellors to understand and apply the principles which their predecessors had applied. It enabled them more easily to grasp the principles laid down in those Year Book cases[3] which, as the literature of this period shows, were then almost the only other authorities on the substantive rules of equity.

Thirdly, although the Latin version of the first Dialogue is from the point of view of the early history of equity the most important, the English version is by far the most important from the point of view of the modern history of equity. The popular form in which the canonist principles were expressed, and their detailed application to the technical rules of English law, which the dialogue form rendered possible,[4] facilitated the development

[1] L.Q.R. xxiv 378-379—"St. Germain's definition of equity is drawn through Gerson from Aristotle: equity comprises the guiding principles for the adaptation of general rules to particular cases. . . . The Greek philosopher, however, did not specify from what particular sources such a guiding principle should be derived: he dwells rather on the necessity of taking into account all the complex circumstances of each single case. The canon lawyers did discover a guiding rule in conscience, and it is important from the outset that in the jurisprudence of the English Courts of the time this principle came to be accepted on all sides—by Common lawyers as well as by Chancery lawyers."

[2] Above 216 n. 3; see vol. ii 245-249, 334-347 for the equity of the thirteenth and fourteenth centuries.

[3] Above 220-222.

[4] "His scheme of putting before his readers in a kind of living opposition the ideas of an English lawyer and of a theologian versed in Canon law was more than a passing happy thought, and it was carried out with considerable skill." Vinogradoff, L.Q.R. xxiv 374.



of these principles on native lines. In fact, as we have seen,[1] St. Germain did for the canonist principles which he took from Gerson what Bracton did for the civil law principles which he took from Azo.[2] Both writers adapted foreign principles to an English environment. In both cases there was a reception and a use of foreign principles thus adapted which helped on a native development of the law. But in neither case was there any reception in detail of foreign law.

For all these reasons St. Germain's treatise has exercised as great an influence upon the development of modern equity as Bracton's treatise has exercised upon the development of the common law. From both books many generations of lawyers drew the root principles underlying the many technical rules to which a continuous development gave rise.

*The Controversial Tracts.*

St. Germain's wide outlook and cosmopolitan learning, which enabled him to popularize the canonist conception of equity and to define its relations to the common law, was naturally not very comprehensible to those common law practitioners who were very ignorant of anything else but the technicalities of their own system. The Year Books, as we have seen, show that the growth of equity was accompanied by a growth of professional jealousy on the part of the common lawyers.[3] Hence it is not surprising to find that an anonymous serjeant-at-law entered the lists to defend the common law against the aspersion that any supplementary system could be necessary to enable it to do complete justice in all cases.

The Replication of the serjeant-at-law to the Doctor and Student was obviously written shortly after the publication of the English version of the Doctor and Student.[4] The internal evidence of the tract would seem to show that it was written, as it purports to be, by a serjeant-at-law, who had been brought up on the common law, and on that alone. He is wholly unable to appreciate the fact that the common law had any defects at all. "The lawe of the realme is a sufficient rule to order you and your conscience what ye shall do in everie thinge, and what ye shall not do."[5] He could not see, for instance, that the system of uses, though liable to abuse, did successfully remedy some very grave defects in the land law.[6]

[1] Vol. iv 276 n. 2.

[2] Vol. ii 267-286.

[3] Vol. i 459; vol. ii 595; above 221.

[4] Harg. Law Tracts 323-331; the full title is, "A Replication of a Serjaunte at the Lawes of England, to certayne Pointes alleaged by a Student of the said Lawes of England, in a Dialogue in Englishe between a Doctor of Divinity and the said Student."

[5] At p. 327.

[6] At pp. 328-331.

A rejoinder to this replication of the serjeant was made by the anonymous writer of the "Little Treatise concerning writs of Subpœna."[1] It is a far abler performance than the Serjeant's. The writer can see that there are two sides to the question. Thus, while defending uses, he is quite prepared to admit that "unquietness and trouble" may sometimes be caused by them.[2] He is sufficiently learned to state and defend effectively the position of the court of Chancery in relation to the common law courts.[3] In fact the use which he makes of statutes and Year Book cases[4] anticipates the arguments used in the seventeenth century. Thus, for instance, he shows that the existence and jurisdiction of the Chancery are assumed by the makers of some of these statutes;[5] and that consequently the equity administered by the chancellor is an integral part of the law of England.[6] It is because the writer does not deal in mere generalities either in this or in any other part of his argument, that the tract, though controversial, affords valuable evidence as to the actual position of the equitable jurisdiction at the time when it was written. It is clear that already it is possible state rules as to the cases in which equity will intervene,[7] as to the cases in which it will not,[8] and as to the cases in which it is doubtful whether or not it should intervene.[9] At the same time it is also clear that, though it could be stated that there were certain cases in which the chancellor would intervene, and certain cases in which he would

[1] Harg. Law Tracts 332-355; Hargrave tells us that both this and the preceding tract are printed from a MS. in the Cottonian Library at the British Museum, to which is added the following note: "Founde amongste the bookes of Sir Edward Saunders, late chiefe justice of England, and after chiefe baron of the exchequer and noted by his hande writinge to be entitled on the outside, *The Dialogue betweene a Serjaunte at the Lawe and Christopher Seinte German;* and on the inside, *The Answer of this Treatise by Christopher Seinte German;*" there seems to be no other evidence that this treatise was written by St. Germain; for Saunders, who was made chief justice in 1558, and chief baron in 1559, see below 350 n. 1.

[2] At p. 341. [3] At pp. 332-333.

[4] "Manye times the justices . . . determined that a subpœna hath lyen, and some times have reasoned to the doubt that hath risen betwixte the parties admittinge the subpœna to lye . . . and there be so many cases reported thereof that it needeth not to recite them here," op. cit. 332.

[5] Thus, dealing with 17 Richard II. c. 6, and 15 Henry VI. c. 4, which empowered the chancellor to take security for costs and to give damages, vol. i 403, he concludes that "they that weare of the parliament at the makinge of the said statutes assented, that in some cases a man mighte be righteouslye sued in the chauncerie," op. cit. 333.

[6] Answering the argument that to issue a writ of subpœna is to hinder the operation of the law, which to do is contrary to the king's coronation oath, he says—"the Kinge's oathe in that pointe is this, that he shall graunte to hold the lawes and customes of the realme; and then if the lawes and customes of the realme shall be understood as well the lawes and customes used in the chauncery as at the common lawe, as I suppose, they may be . . . then it is not againste the kinge's oathe, though the chauncellor by means of a subpœna minister justice unto the subjects," op. cit. 351; and cp. ibid 338 where the same argument is more elaborately stated.

[7] At pp. 332-342. [8] At pp. 343-346. [9] At pp. 346-347.



not, no substantive rules of equity as yet existed. There is the background of principle laid down in the Doctor and Student; there is the list of cases in which the chancellor habitually acted; but the two are as yet very separate. Much is still left to the conscience of the chancellor—so much that the author can even speculate whether the chancellor, if he is negligent in the hearing of the case, may not "charge himself in conscience some tyme with damages, some tyme with the whole thinge that is in demaunde before him, tho' he cannot be compelled thereto because he is judge of recorde."[1]

Three other tracts deal with this same controversy between the common law and the Chancery at a later stage. A tract styled "Privileges and Prerogatives of the High Court of Chancery" was published in 1641. It is stated on the title page that it is by Lord Ellesmere. But there is no external evidence of this; and the internal evidence is against it. It is simply a commonplace commentary on Magna Carta and certain other statutes, which the common lawyers contended were decisive against the claim of the Chancery to issue injunctions against the judgments of the common law courts.[2] The second tract is much later in date. It was published in 1693 at the end of the first volume of Reports in Chancery,[3] and was meant to be an answer to the views expressed by Coke in his Third and Fourth Institutes.[4] But, though later in its date of publication, it belongs, from the point of view of its subject matter, to this period. It gives the report of Bacon and his fellows on the claims of the Chancery, and elaborately and, on the whole successfully, defends it. The third tract is of quite a different character. It was written by George Norburie, evidently a practitioner and an office holder in the court. It is entitled "The abuses and remedies of the High Court of Chancery."[5] It is dedicated to Lord Keeper Williams, and its object is to point out the best way to remedy some of the abuses of the court which had come before Parliament. These abuses he groups under three heads:—"the straining of authority of the court beyond its limits in matters of judicature; the impunity of litigious persons; and dilatory proceedings."[6] On all these points he clearly states the abuse, and

[1] At pp. 348-351.

[2] The title is misleading; it is, as it states on the first page, merely "Notes and observations upon the Statute of Magna Carta, c. 9 (a mistake for 29) and other statutes concerning the proceedings in the Chancery in cases of Equitie and Conscience."

[3] Wallace, The Reporters 478; its full title is "Arguments proving from antiquity the dignity power and jurisdiction of the court of Chancery."

[4] At p. 2.

[5] Harg. Law Tracts 427-448; for an account of these abuses see vol. i 424-428.

[6] At p. 430.

is prepared with a remedy. Occasionally he is a little inconsistent. Thus in one place he wishes that the rules of equity were better fixed—"the old rule must ever hold true, that the commonwealth is best governed when least is left to the direction of the judge."[1] In another he sneers at judges who, in administering equity, are "inquisitive after precedents."[2] Apparently he did not see that the only way in which the rules of equity could be fixed was by the inquisitiveness which he condemned. But on the whole it is an able tract, and diagnoses truly the abuses from which the court then suffered, and for two centuries continued to suffer. It marks a later stage in the contest between common law and equity—the common lawyers had been worsted by James I.'s order, but they were still able to attack the court in Parliament. It thus marks the beginning of that Parliamentary opposition to the court which for a short period proved fatal to it.[3]

*Tracts dealing with the Chancellor and his Court.*

Of the tracts which deal with the office of the chancellor, with his court, and with its jurisdiction and procedure, the following four are the most important.

The first is "A Treatise of the Maisters of the Chauncerie."[4] It is anonymous, and, from internal evidence, it appears to have been written when Egerton was lord keeper, and before he became lord chancellor with the title of Lord Ellesmere. The writer was obviously himself a master, and a contemporary of Lambard. The treatise describes firstly the manner in which the masters were created, secondly their "sundry appellations" and their number, thirdly their dignity and place, fourthly their duties and "what manner of learninge is requisite in them," and fifthly their fees. It is a clearly written, straightforward piece of work. The second of these tracts is entitled "Certaine Observations Concerning the Office of the Lord Chancellor." It was published in 1651, and was attributed to Lord Ellesmere.[5] But internal evidence shows clearly that it was not written by him, though it is possible that he may have encouraged the author to write it.[6] The first

[1] At p. 431.

[2] "Some judges, when they seem doubtful what to determine in a cause, will be inquisitive after precedents; which I cannot conceive to what purpose it should be, unless that being desirous to pleasure a friend . . . they would faine know whether any before them have done so ill as they intend to do," at p. 446.

[3] Vol. i 431-434; below 445; vol. vi c. 6. [4] Harg. Law Tracts 293-319.

[5] The Preface states that the copy was delivered by John Harding, late of Gray's Inn deceased, one of the readers of that Society, and was said by him to have been composed by Lord Ellesmere; but it does not seem clear who this John Harding was; the book was published in 1651, but the only John Harding mentioned in the Pension Book (at p. 422) was not called till 1658.

[6] This is clear (1) from the manner in which (at pp. 52-58) he deals with the statutes, the interpretation of which was matter of controversy between the chancery and the common law; he concludes his discussion as follows: "So that by this may appear that the absolute power (of the chancellor) was feared and prevented in the time of K. John . . . and that it was frequented and usurped in the time of Edward 3, who so often restrained the same, and it was allowed and established in the time of R. 2, who in some part made Reformation thereof;" (2) from the epilogue—"the which poor barren treatise I have not presumed to collect either for instruction of his Honor (from whose wisdom I have always thought nothing can be hidden) or for ostentation of my reading and experience (who do freely acknowledge myself the most ignorant man of my profession) but to this end . . . have I done it, partly to provoke some good matter from those learned lawyers, and skilful Antiquaries that are attendants upon his Lordship, and especially for satisfaction to his desire that did demand it and may command me."



part of the book is taken up with a general account of the office of chancellor, of the court of Chancery, and of some of the officers of the court.[1] The remainder of the book is divided into two parts. The first part deals in eight short chapters with the jurisdiction and procedure of the court. The second part deals in six chapters with certain topics of equitable jurisdiction, and in three other chapters with other pieces of jurisdiction exercised by the lord chancellor. The writer emphasizes the uncertainty of the principles of equity, owing to the fact that they depend upon the chancellor's conscience[2]—"whereby the man of law is not able to informe his Clyent what is like to become of his action, or whether it be determinable in the court of Chancery or to be tryed at Common Lawe."[3] At the same time he promises to cite "a competent store of cases where upon reasonable conjecture may be grounded what is like to fall out."[4] But his authorities are for the most part the Year Books and the Doctor and Student. He very rarely cites any more modern case, and ignores the statute of uses, though he cites on other topics several later statutes of Henry VIII. and Elizabeth's reigns. It is a rather pretentious and a very second-rate piece of work. The third of these works is Crompton's chapter on the Chancery in his book on the authority and jurisdiction of courts.[5] The subject is naturally treated from the point of view of a common lawyer,[6] and the main authorities relied upon are the Year Books, The Doctor and Student, Dyer, Plowden, Fitzherbert, and Brooke. It is a somewhat formless collection of cases upon the question whether or no the court will give a remedy. The last of these books is the account of the Chancery given by West in the second part of his Symboleography.[7] West knew something of the civil law. He can cite the Digest, and some of the modern writers on the

[1] At pp. 1-41.

[2] "What manner of general notions the lord chancellor doth assign unto himself for limitation of equity and direction of his conscience, that lyeth hidden and concealed in his own breast," at p. 7.

[3] Ibid. [4] Ibid.

[5] At pp. 41b-67; for this book see vol. iv 211-212; a work of the same character, but less detailed, is Coke's chapter on the court of Chancery in the Fourth Institute.

[6] See pp. 66b, 67, where he discusses the statute 4 Henry IV. c. 23 vol. i 462.

[7] For this book see below 389-390.

civil law such as Budé and Oldendorp.[1] He can therefore give an intelligible account of the nature of equity and its relation to law, by way of introduction to and explanation of the powers of the Chancery as a court of conscience.[2] After describing the powers of the Chancery, he gives a short summary of the cases in which it will interfere,[3] and passes on to the main topic of his book—the forms of the writs and pleadings in use in the court.[4]

The largest part of West's book thus deals with procedure. It is a collection of precedents for the use of practitioners. Other books on this topic are "the Practice of the High Court of Chancery Unfolded," published in 1652 together with Choyce Cases in Chancery. It deals mainly with the court itself, its jurisdiction, and practice; but it occasionally diverges into other topics. Thus it tells us something of the substantive rules as to the cases in which equity will give relief,[5] as to the history of the court,[6] and as to other functions of the Chancery.[7] A smaller book of a similar character is appended to Tothill's Transactions of the High Court of Chancery. A chapter in Thomas Powell's Attorney's Academy[8] gives clear directions for the conduct of a suit in Chancery.

It will be clear from this summary that the literature of equity as yet mainly consists of tracts upon somewhat disparate topics. A definite and accepted theory has been arrived at as to the nature of the distinction between law and equity. The independent position of equity in relation to the law has been successfully asserted and defended. Some definition of the cases in which equity will intervene, and of the principles which it will apply, has been reached. Some definite rules of procedure have grown up. But as yet little progress has been made in the direction of welding these various principles and rules into a connected system. For this we must wait till the beginning of the systematic reports of equity cases in the latter part of the seventeenth century. But at the end of this period we can see the beginnings of this process in one or two small collections of cases, which were made at the beginning, and printed in the middle of that century.

(4) *The Reports.*

The best evidence that the Court of Chancery was beginning to create a body of substantive rules is to be found in the fact that the lawyers who practised in the court, and the officials

[1] See e.g. pp. 173b, 174.
[2] At pp. 173b-177a.
[3] At pp. 177b-183a.
[4] At pp. 183a-290b.
[5] At pp. 40-49.
[6] At pp. 53-59.
[7] At pp. 83-92, 96-100.
[8] At pp. 1-86; for this book see below 381-382.



of the court, were beginning to make notes of cases therein decided.

We can see the main reason for this practice in developments which were taking place at the end of the fifteenth century. As early as 1483 the chancellor could say that it was the "common course" of the Chancery to grant relief in certain cases, and that it was so recorded.[1] But when a court has acquired a "common course" which is recorded, it soon develops fixed rules of practice, which, in their turn, gradually create fixed substantive rules. No doubt this process operated more slowly in the case of the Chancery than in the case of the courts of common law, because, all through this period, equity was equity—it tried to lay down the ideally just rule applicable to the circumstances of each particular case. But the influence of the new school of lawyer chancellors was beginning to be felt at the end of the sixteenth century. Lambard, who, as we have seen, was a master in Chancery,[2] notes that the question, "whether it be meete that the Chancellour should appoint unto himselfe and publish to others any certain rules and limits of equity," was one "about the which men both godly and learned doe varie in opinion;"[3] and it is clear that the opinion in favour of an affirmative answer to this question was growing in strength. As we have seen, the Chancery Orders were beginning to lay down a few fixed rules;[4] and we shall see that Lambard himself thought it worth while to make a collection of cases that seemed to him to be notable.[5] In fact, the evidence both of the records of the court and of the cases points in the same direction. At the very beginning of the seventeenth century the records show that for the decision of certain points recourse was had to precedent. In 1600 the plaintiff's counsel, having alleged that they could show precedents for the exercise of the equitable jurisdiction, the court ordered

[1] Y.B. 22 Ed. IV. Pasch. pl. 18—"Le Chancelor dit, que est le comen course en le Chancery pur granter [subpoena] encontre obligacions, et auxi sur feoffements de trust lou l'heir le feoffee est eins per discent on auterment, car nous trouvomus recorde en le Chancery de tiels."
[2] Above 260.
[3] Archeion (ed. 1635) 83-85—"Whether it be meete that the Chancellour should appoint unto himself, and publish to others any certaine Rules and Limits of Equity, or no; about the which men both godly and learned doe varie in opinion: For on the one part it is thought as hard a thing to prescribe to equity any certaine bounds, as it is to make any one generall law to bee a meet measure of justice in all particular cases. And on the other side it is sayd, that if it bee not knowne before hand in what cases the Chancellour will reach forth his helpe, and where not, then neither shall the Subject bee assured how, or when he may possesse his owne in peace, nor the practizer in Law be able to informe his Client what may become of his Action;" see above 272 for Norburie's opinion that too great attention was sometimes paid to precedents.
[4] Above 265.
[5] Below 277.

them to produce their precedents next term;[1] and, in the following year, on the question of awarding a sequestration, precedents were cited.[2] In 1604 there is a reported case in which Lord Ellesmere seems to assume that "a full decree" would be a precedent for like cases;[3] and other cases decided in accordance with precedents occurred in 1626,[4] 1649,[5] and 1650.[6]

Under these circumstances it was inevitable that both the lawyers who practised before the court, and the officials of the court should make collections of cases for their own use. As common lawyers practised at the chancery bar, it was inevitable that some of these cases should find their way into the collections of cases which they made. We have seen that a fair number of them were reported in the Year Books and found their way into the Abridgments.[7] Similarly, a few of them appear in the collections of Brooke, Dyer, Coke, Gouldesborough, Popham, Moore, and Rolle;[8] and, at the end of the sixteenth century, collections devoted entirely to cases decided in the court of Chancery were being made. Like the early reports of cases decided in the common law courts,[9] these early reports of cases decided by the court of Chancery are short and scrappy. They are more like notes in an Abridgment than regular reports. And just as the maker of one early MS. of the Year Books thought it necessary to prefix to it a rough alphabetical Calendarium, so, one of the earliest collections of Chancery cases—that made by Tothill—is arranged on the alphabetical plan.[10] But, unlike the reports of cases decided by the common law courts, two of the earliest of these collections were made by officials of the court.[11]

[1] Monro, Acta Cancellaria 744-745—the case had been referred to the judges for their opinion; "yet nevertheless, the said justices cannot be procured to certify their opinions; and the rather, because they something vary in opinion (as it is supposed); for which cause the plaintiff's counsel most humbly desired that the cause in equity may be heard in this court, and alleged that like cases have been retained and relieved in this court, as will appear by several precedents"; for earlier cases in which precedents were cited before Hatton see Spence, op. cit. 423 n. *b*; and before Nicholas Bacon, ibid 416 n. *b*.

[2] Monro, op. cit. 758-759.

[3] Mynn v. Cobb, Cary 25—"*Nota* . . . the trust was not so fully proved as the Lord Chancellor would make a full decree thereupon, so as it should be a precedent for other causes, and yet so far forth proved, as it satisfied him as a private man; and therefore in this case he thought fit to write his letters to the defendant to conform himself to reason; and affirmed, that if he should find the defendant obstinate, then would he rule this cause specially against the defendant, *sans la tires* consequence."

[4] Jackson v. Barrow (1626) Nelson 2-3.

[5] Underwood v. Swain (1649) 1 Ch. Rep. at p. 162.

[6] Thin v. Thin (1650) 1 Ch. Rep. at p. 163.

[7] Above 220-222.

[8] For these reports see below 357-362.

[9] Vol. ii 536-537.

[10] Ibid 537 n. 1.

[11] That the practising lawyers also made collections of cases is probable from what is said in the Preface to Nelson's Reports; the editor says that most of them



The following are the collections of Chancery reports which belong to this period:—

In 1649 was published Tothill's Transactions of the High Court of Chancery.[1] Tothill, the title page tells us, was one of the Six Clerks, and the work was published and edited after his death by Sir Robert Holborne, one of Hampden's counsel in the case of Ship Money. The book contains two treatises. The first part—the Transactions of the High Court of Chancery—consists of very short notes of cases arranged alphabetically. In many cases the references to the registrar's books are given. All we can gather from these notes is that a certain point has been decided, and often that point is so obscurely stated as to be unintelligible. The second part consists of a short account of the Procedure of the Chancery. In the following year there was published by master George Carew[2] a collection of cases which he had gathered "out of the labours of master Lambard." These are known as Cary's reports, as his name is so spelt on the title page.[3] They are short notes of points decided between 1537 and 1604, and, as Monro says,[4] "they are very often mere verbal transcripts from the registrar's books." In 1652 another little book was published anonymously, which comprises both a tract on procedure and some notes of cases.[5] The tract on procedure, called "The Practice of the High Court of Chancery Unfolded," I have already mentioned.[6] The notes on cases are usually styled "Choyce Cases in Chancery." They report cases decided between 1557 and 1606.

"were transcribed from the fair Manuscript of a late Attorney-General, and are supposed to be collected by him for his own use, amongst many more which have been copied from that very Manuscript, and probably by some of his Clerks, for I find them already printed in the first Reports which were published of this nature. Some of the later cases have been added by one who formerly attended at the Court."

[1] The Transactions of the High Court of Chancery, both by Practice and President, With the fees thereunto belonging, and all speciall orders in Extraordinary cases, which are to be found in the Register's Office as they are quoated by Tearmes Yeares and Bookes. Collected by that famous lawyer, William Tothill, Eqr.; late one of the 6 Clearkes. And since reviewed by Sir Ro. Holborne, Bencher of Lincoln's Inn; there was a second edition in 1671, and reprints in 1820 and 1872, Wallace, The Reporters 474-476.

[2] He had served as ambassador and master of the Wards, as well as master in Chancery, Monro, op. cit. 29, 30.

[3] Reports or Causes in Chancery. Collected by Sir George Cary out of the Labours of Mr. William Lambert; another edition was printed in 1668, there was a third edition in 1820, and a reprint in 1872, Wallace, op. cit. 469; to it is added the king's decree as to the Chancery of 1616.

[4] Op. cit. 29.

[5] The Practice of the High Court of Chancery Unfolded, with the Nature of the several Offices belonging to that Court, and the Reports of many Cases wherein relief hath been there had, and when denied; there was a second edition in 1672, and a reprint in 1870, Wallace, op. cit. 474.

[6] Above 274.

Other sets of Chancery reports contain cases of this period. There are one or two cases in Dickens, and a number of cases in the Reports in Chancery, and in Nelson's reports. But these reports belong to the following period, and I shall describe them later.[1]

We must now turn to the evolution of the principles which gradually began to guide and limit the discretion of the Chancellor in his administration of equitable relief.

### *The Subject Matter of the Rules of Equity.*

The history of the court of Chancery and its equitable jurisdiction,[2] the history of the chancellors and other officials of the court,[3] and of the literature of and the authorities for the early rules of equity,[4] combine to prove the fact that there is a great difference between the subject matter of the rules of equity in the fifteenth and early sixteenth centuries, and their subject matter in the latter part of the sixteenth and earlier part of the seventeenth centuries. In the former period the extent of these rules is very vague; and the turbulence of the country, quite as much as defects in the law, gave rise to many interferences of the chancellor on the grounds of equity and conscience. In the latter period many causes were combining to confine such interference to certain defined channels. The turbulence of the country was being suppressed by the Council and the Star Chamber; some of the defects of the common law were being remedied partly by the legislature, and partly by the efforts of the judges; and the influence of the lawyer chancellors tended to foster the development of fixed rules, and to keep these rules in touch with the new developments which were taking place in the common law. I shall therefore take this chronological division between these two periods as the basis for my treatment of this subject.

#### The Fifteenth and Early Sixteenth Centuries

In tracing the origins of the rules of substantive law we must, as a rule, look to the early history of the forms of action. They supply us with the ground plan round which the substantive law has grown up. But in tracing the history of equity we have no such ground plan. We start with a uniform, and, in early days, a simple procedure,[5] which is applied to a very miscellaneous set of cases. If we look at any collection of these cases, there appears at first sight to be very little connection between them. In fact, the only connection is the single circumstance that in all of them the plaintiff thinks that, either owing to his peculiar

[1] Vol. vi c. 8. [2] Vol. i 404-412, 445-465.
[3] Above 218-261. [4] Above 261-278. [5] Below 284-287.



position, or owing to some defect in the law substantive or adjective or in its administration, or on all these grounds, he has a case which will appeal to the conscience of the chancellor, and therefore induce him to compel the defendant to do that which he conscientiously ought to do. Obviously, the variety of circumstances which constitutes the peculiar position of plaintiffs is infinite; and the defects which could be alleged in the law or its administration were very numerous, especially as the petitions addressed to the chancellor on this ground were based upon defects, not only in the law administered by the common law courts, but also in the law administered by the local and the ecclesiastical courts. It is, however, the cases which turn upon the defects of the common law which are the most important, both because the common law itself was the most important body of law in the state, and because it is to the action of the chancellor in some of these cases that we must look for the origins of some of our modern rules of equity.

We can group the defects in the law which gave rise to the action of the chancellor under two main heads:—(1) defects in the machinery of the law, and (2) defects in its subject matter. Under these two heads, therefore, I shall trace the history of the administration of equity during this period.

(1) Cases which turn upon defects in the machinery of the law.

The defects in the machinery of the law arose either (i) from faults in the machinery itself or its working, or (ii) from the non-existence of adequate machinery.

(i) *Faults in the machinery itself or its working.*

I have already said something of these defects.[1] In order to understand the manner in which these defects gave rise to the interposition of the chancellor, we must look at them in the light of some of the bills sent up to him.

(*a*) The process of the common law was very dilatory. In 1389 a shipowner appealed to the chancellor because merchants would not pay money due to him, and he cannot "stay for a long prosecution."[2] A little later a plaintiff brought a case of forcible entry before the chancellor, "because he hath no speedy remedy given to him by the common law."[3]

(*b*) It was also very expensive. The poverty of the plaintiff and the expense of a common law action were frequently assigned as the causes for an application to the chancellor. Thus a plaintiff alleged that she had been induced to part with her property to a

[1] Vol. ii 554, 589; vol. iii 617-619, 624-627.
[2] Select Cases in Chancery (S.S.) 10. [3] Ibid 66.

suitor who had promised to marry her—but the suitor went off with the property, and it appeared that he was a married man who had previously deceived others in like manner. She appealed to the chancellor because she was not "of power to sue her recovere by way of accion after the cours of the comen lawe of this lond for grete poverte, her said goodes thus beyng oute of her possession."[1]

(*c*) Common law process was very technical, and very inadequate. It was possible for a defendant to evade service of a writ by constantly shifting his residence; or by fleeing to privileged places, such as Wales, the counties Palatine, or other franchises, where the king's writ did not run. Both these states of fact were sometimes alleged as reasons for an appeal to the chancellor.[2] Wager of law was a possible defence in many actions; and plaintiffs went to equity to avoid it.[3] The common law did not take cognizance of acts and transactions entered into abroad.[4] In Edward IV.'s reign a wool merchant prayed for an account to be taken of his dealings with another merchant resident in Calais—"for as muche as the delyverance of the seid wolles, and resceyt of the money therfore, and all the oder deallyng above said, wer don owt of this roialme, your same besecher hath no remedy by the comen law in this behalfe."[5] Until the common law courts modified their strict rules of venue,[6] many mercantile actions were both for this and other reasons necessarily brought before the Council or the court of Chancery.[7] The "formulary system" of the common law was very rigid. It was not possible for several plaintiffs to join their several causes of action in one writ, nor could a single plaintiff join in one writ his different causes of action against several defendants.[8] Nor, as we have seen,[9] was it possible for an unincorporate body to sue or be sued as a collective unit. We have seen that such a body could sue in Chancery. Again, in the fifteenth century, the notions of the common lawyers upon the subject of corporate

[1] Martin, Some Chancery Proceedings of the Fifteenth Century 19; cp. Select Cases in Chancery (S.S.) 47; John Thomas v. John Wyse and John Clerk, Chancery Proceedings (R.C.) i *xiii*; Barbour, The History of Contract in Early English Equity 78.

[2] Ibid 80-82. [3] Ibid 99. [4] Above 117-119.

[5] Thomas Uncle v. Richard Fyldyng, Proceedings in Chancery (R.C.) ii *lxv*; cp. Barbour, op. cit. 76, 77, 154-155.

[6] Above 117-119, 140-143.

[7] Cp. Select Cases in Chancery (S.S.) 3-4 (1386)—agreement to pay freight; ibid 58; ibid 88-90—a case in which the bill was dismissed probably because the matter sued on had taken place in England; Proceedings in Chancery (R.C.) i *xxxviii*.

[8] See Barbour, op. cit. 72, citing The Practice of the Court of Chancery Unfolded 4, and several cases of this period for the contrary practice in equity.

[9] Vol. iv 439-440, 477-478.



bodies were very hazy—there were difficulties in the way of actions by corporate bodies against their members, based on the notion that a man cannot sue himself.[1] In Henry V.'s reign the provost and commonalty of Plymton Earls, in the county of Devon, complained that their market had been disturbed by a riotous band, but that, as the six known members of this band were members of the commonalty, no action could be taken against them by the common law.[2] There were similar difficulties in the way of one executor suing another.[3]

(*d*) The system of pleading at the common law was becoming so rigid that litigants who had substantial justice on their side might often be defeated. It was otherwise in the Chancery.[4]

(*e*) The common law methods of getting the evidence of the facts in issue before the court were most rudimentary; and obviously this considerably aggravated the evils flowing from the rigidity of the rules of pleading. Reliance was still placed upon the knowledge of the jury, although the jury were fast ceasing to have a first-hand knowledge of the facts.[5] Volunteer witnesses were still discouraged by the fear of proceedings for maintenance.[6] But witnesses had a good defence to such proceedings if they had been required to testify by a competent court.[6] Hence we get petitions to the chancellor by would-be witnesses that he would command them to testify.[7] Again, the parties to an action could not give evidence at common law. Therefore we get applications to the chancellor to summon persons accused of various misdeeds and examine them as to the facts alleged.[8] Much less could one party to an action force the other party to discover evidence necessary to the success of his action. Thus we have a curious case of the beginning of the fifteenth century,[9] in which two plaintiffs complained that the

[1] Vol. iii 482-483. [2] Proceedings in Chancery (R.C.) ii *viii*.

[3] See Barbour, op. cit. 56; Mr. Barbour ibid n. 1 questions Fitzherbert's statement, F.N.B. 117 D that account lay as between partners; but Y.B. 41 Ed. III. Hil. pl. 8 (p. 4) makes it clear that it lay when one man bailed to another money to trade with; the objection to the action in that case was that the trading had taken place in Brittany, but it did not prevail and the plaintiff got judgment, Y.B. 41 Ed. III. Pasch. pl. 4; and cp. Y.B. 34 Hy. VI. Trin. pl. 4; Crompton courts 49 b partnership is not mentioned eo nomine in either case, but the case of receiving money to trade with would cover most cases of partnership; the other defects of the action of account, below 288, vol. ii 367, vol. iii 426-427, explain why partners resorted to the Chancery.

[4] Ibid 641-642; below 285-286. [5] Vol. i 332-337. [6] Ibid 335.

[7] Proceedings in Chancery (R.C.) i *xix*; ibid i *cxxxiii*—a bill of Edward VI. s reign asking that writs of subpœna may be directed to the defendants to compe them to appear before the sheriff and a jury to give evidence; cp. Select Cases in Chancery (S.S.) 122.

[8] We find this request in the great majority of bills; see e.g. Hastings v. Dacy, Chancery Proceedings (R.C.) i *xix*; Earl of Shrewsbury v. Coland, ibid *xl*; Willebye v. Veyle, ibid ii *xvi*, *xvii*.

[9] Select Cases in Chancery (S.S.) 110.

defendant had taken from them two prisoners, which they made at the battle of Agincourt, and ransomed them. They prayed that a certain part of the ransom, said to be in the hands of the wife of the Treasurer of Calais, might be stopped, and that the defendant might be examined to discover the names of the prisoners. A more usual case was an application for the discovery of documents needed to prove a title to land or chattels.[1] And these applications for discovery of documents were made not merely against the other party to the action: they were made, and made successfully,[2] against any third persons who had the necessary evidence in their possession.[3] Nor apparently was it then necessary that an action should have begun.[4] In fact many of these actions shade off into actions for the recovery of specific things which the plaintiff could not recover at law because he could not describe them with certainty.[5] Such applications will become less necessary when the action on the case for trover and conversion has superseded detinue.[6] It will then become possible to distinguish between these applications for discovery, and to define the limits within which discovery will be allowed.[7] Still more was interposition of equity needed if a party desired to place on record evidence which was vital to him, but which was in danger of perishing. This was the reason for applications to perpetuate testimony. We get in Henry VII.'s reign a bill of John, earl of Oxford, which tells us how Elizabeth his mother, by reason of her faithful allegiance to Henry VI., was coerced to convey her lands to Richard III., then duke of Gloucester; and how there were living divers witnesses of great age to the fact of this coercion. The bill therefore asked that these witnesses might be summoned to depose what they knew in order that their depositions might be "entred and remayne of recorde."[8]

(*f*) In addition to all these defects the machinery of the common law was, as we have seen, abused by the great and

[1] Hulkere v. Alcote, Chancery Proceedings (R.C.) ii *xv*, *xvi*.

[2] See the decree in Select Cases in Chancery (S.S.) 108 and n. 5; Y.B. 39 Hy. VI. Mich. pl. 36—a grantee from the king of goods of an attained traitor gets discovery of these goods from one in whose possession they are.

[3] See Reed v. the Prior of Launceston, Chancery Proceedings (R.C.) i *cxiv*; Fellow v. Make ibid i *cxxvii*; Duke of Somerset and others v. Payn, ibid ii *xxix*; Baker v. Parson and others, ibid ii, *i*.

[4] Martin, op. cit. 17; he says that such bills usually contain the following clause or something like it, "As your seid suppliaunt knoweth not the certeintye nor numbre of the seid evydences, nor whether they be enclosed in bagg, boxe sealed, or chest loken, he can have no remedy by the common lawe."

[5] Last note; cp. Hulkere v. Alcote, Chancery Proceedings (R.C.) ii *xv*, *xvi*.

[6] Vol. iii 350-351; vol. vii 402-414; cp. Spence, op. cit. 643 n. *c*.

[7] Below 332.

The earl of Oxford v. Tyrell and others, Chancery Proceedings (R.C.) i *cxx*.



powerful in order to cover their acts of violence and fraud.[1] Hence applications to the chancellor grounded upon facts of this kind bear a very large proportion to the total number of these applications. These bills allege such acts as the vexing of the plaintiff with groundless legal proceedings,[2] the corruption of jurors[3] and local officials,[4] the misuse of the machinery of the local courts,[5] of the common law courts,[6] and of the court of Admiralty,[7] maintenance[8] and champerty,[9] and very often conspiracy to defraud,[10] or to terrorise[11] or corrupt[12] the jury. Of this mass of cases only one or two illustrations can be given.

A typical case illustrating the vexation of plaintiffs by groundless legal proceedings comes from the end of the fourteenth century.[13] One Campyn Prynell, merchant of Lucca in Lombardy, complained that Richard Underwood, tailor of London, had vexed him by divers feigned actions of trespass for taking away his wife and goods. Two actions in the King's Bench had ended in the nonsuit of Richard. Notwithstanding, "the said Richard hath feigned two plaints against the said suppliant, which are still pending, by which the said Richard purposeth by the assistance of divers of his maintainers to await the said suppliant with jurors procured and not indifferent." The facts, as stated by the suppliant, seem to have been that the lady whom Richard claimed as his wife was not his wife at all, as she had been divorced from him by reason of a precontract. Another case illustrates the manner in which a false verdict was procured.[14] Two citizens of London had had their purses cut. The plaintiff found one of the purses and held it up to show that he had found it. The owner took it and said that unless he would deliver the other purse he would arrest him; and though, on his being searched, nothing suspicious was found, he was arrested. The owner of the purse then "summoned suche an enquest that iiij of the same undertoke to rewle all ther felowship. And they had with them . . . datis, reysons of

[1] Vol. ii 414-416.

[2] Damico v. Burdican, Proceedings in Chancery (R.C.) i *ciii*.

[3] Martin, op. cit. 9, 10.

[4] Ibid 6-9; Proceedings in Chancery (R.C.) i *xxxii*, iii—the sheriffs of Norwich ibid i *lxxxvii*;—the mayor of Marlborough; ibid i *ci*—an alderman of Norwich.

[5] Martin, op. cit. 4-6—the Marshalsea; Proceedings in Chancery (R.C.) i *xli*-ii—the court of Scarborough; Select Cases in Chancery (S.S.) 60, 61—court of Dover Castle.

[6] Proceedings in Chancery (R.C.) i *v-vi*, *cviii-cix*, *cxviii*; cp. Y.B. Ed. IV. Pasch. pl. 5.

[7] Proceedings in Chancery (R.C.) ii *xxxvi*, vii—the applicant has been arrested contrary to the statutes of Richard II. and Henry IV. vol. i 548.

[8] Select Cases in Chancery (S.S.) 11, 12.

[9] Ibid 71-72.

[10] Ibid 72-73.

[11] Below 283-284.

[12] Below 284.

[13] Select Cases in Chancery (S.S.) 20-21.

[14] Martin, op. cit. 12.

currannce and other spyces att the cost and purveyaunce of the seid John Aleyn [the owner of the purse] . . . and made all the remenannte of the enqueste to feynte for defaut of sustenaunce that without they had sayd as the iiij did, they had ben like to have dyed." The result was the plaintiff was cast in damages, and, for non-payment, was arrested. Mr. Trice-Martin has printed another case turning upon the suspicions entertained of a London jury.[1] It appears that the defendant John Martyn of London, draper, had agreed to bet Miles Bysney, also of London, 30s. on a horse race into York, and that the 30s. had been deposited with the plaintiff, William Whytyng of York. John Martyn's horse had won by foul play, and it was generally agreed that the 30s. should be paid over to Miles, and this had been done. But Whytyng, having come to London, Martyn caused him to be arrested in an action of account for the 30s. He proposed by twelve of his neighbours to get him condemned. "Wherfor your seid suppliaunt mekely besecheth your good and gracious lordship tenderly to consider the premysses, and how that the xii men of London owt not to medle with foreyn maters by the lawe, and yet oft tymes they doo, and the partie agenst whom they passe ys without remedy at the comen lawe bycause ther lyeth none atteynt in London."

Another bill turns upon the troubles of a priest who, as official of the bishop of Chester, had excommunicated the defendant for adultery. The defendant had gone to London, and there had become coroner and escheator. The priest having come to London, the defendant had brought an action of trespass against him, and had had him arrested.[2]

Even foreigners knew how to make use of these legal technicalities. A bill of Edward IV.'s reign[3] tells us how the servant and kinsman of the plaintiff, a Spanish merchant, played at dice with the defendant, a Gascony merchant. The dice were false, and the Gascony merchant won £28. The Spanish merchant thereupon caused the swindler to be arrested. But the swindler "by subtyle meanes hath of late remeved hymselfe in to the Kynge's Benche by means of suerte of the peace . . . and theruppon taken sentwary in Westminster, and nowe by false and untrewe accions troublith your seid oratour in London, that he may not attend his merchaundises, to thentent to cause hym to surcese of his labour and suetes."

If we now turn to the system of procedure and pleading in use in the Chancery we shall see that, in the fifteenth century, it

[1] Martin, op. cit. 11-12.
[2] Meverell v. Saunsum, Proceedings in Chancery (R.C.) i *cv*.
[3] De Castro v. Narbone, ibid i *cii*.



was strong in the very points in which the common law system was weak. In outline the course of the procedure was as follows:—

The plaintiff sent in his bill, which is often quite untechnical in its form and illiterate in its language. The bill usually prayed that a subpœna should be issued to secure the appearance and examination of the defendant.[1] Sometimes the plaintiff offered to produce witnesses in support of his petition.[2] At the foot of the bill were the names of the pledges to prosecute. They were made necessary by the fact that a statute of Henry VI. prohibited the issue of a writ of subpœna till the plaintiff had found sureties to satisfy the defendant's damages if he did not prove his case.[3] But it would seem that these pledges soon became as fictitious in Chancery as they were in the common law courts.[4] When the defendant appeared, both the plaintiff and his witnesses, and the defendant and any witnesses which he might produce, were examined by the chancellor or other person deputed by him.[5] "No doubt," as Spence says,[6] "a recommendation or rebuke from the Chancellor often settled the matter at once, which may account for there being in early times so many bills without any account of ulterior proceedings." But sometimes there were further proceedings. The defendant often began by pleading that the plaintiff had no cause of action in the Chancery, and then went on to answer the bill.[7] Or he might demur to the whole bill,[8] or he might put in other pleas, e.g. that the proper parties had not been joined.[9] Naturally the common lawyers tried to introduce their technical rules of pleading.[10] We get replications and rejoinders in form not unlike those used at common law. But we can see from the Year Books, and early reports of Chancery cases, that the chancellors set their faces against attempts to defeat plaintiffs by insisting upon the technical objections which would have been valid at common law.[11] We shall see, indeed, that at a later period the system of equity pleading developed faults of its own, different from, but as great as those which disfigured the

[1] It sometimes prayed for a writ of Certiorari or Habeas Corpus.
[2] Barbour, op. cit. 147; for the writs Quibusdam certis de causis and subpœna see Baldwin, King's Council 288-292.
[3] 15 Henry VI. c. 4; cp. Barbour, op. cit. 145.
[4] Martin, Archæologia (2nd series) vol. x Pt. II. 353-355—in one case the second pledge is simply the first name spelt backwards.
[5] Barbour, op. cit. 149.
[6] Equitable Jurisdiction i 372.
[7] Spence, op. cit. 373.
[8] Ibid.
[9] Y.B. 8 Ed. IV. Trin. pl. 1, cited ibid n. *h*.
[10] Spence, op. cit. 375.
[11] Y.B. 9 Ed. IV. Trin. pl. 9, cited vol. ii 596; in Y.B. 9 Ed. IV. Mich. pl. 26, the Chancellor said—"Si en cest court il n'est requisite que le bill soit tout en certein solonque le solemnity del comen ley"; Pasmore v. Ford (1581) Choyce Cases 147.

common law system.[1] But in these early days its faults had hardly begun to appear. The chancellor could say with truth that "a man shall not be prejudiced by mispleading or by defects of form, but he shall be judged according to the truth of his case."[2]

Now it is quite clear that this system was free from most of the cardinal defects of the common law system. It was comparatively speedy—the Chancery was not tied down to the law terms, nor was there any undue delay in getting the defendant before the court.[3] This in itself meant that it was less expensive. Moreover, the chancellor always professed to have a special regard for the interests of the poor.[4] It was the reverse of technical, and it was eminently calculated to get at the real facts by the most direct methods. We have seen that the chancellor set his face against allowing these facts to be obscured by the arts of the pleader; and the methods used to elicit the truth by the examination and re-examination of witnesses, and by compelling the production of documents, were very effective. Barbour has explained this very clearly. He says:[5] "the examination was under oath; it is sometimes said to be on the sacrament, sometimes 'on the boke.' If the defendants lived at some distance from London, or were ill and unable to appear, a commission by writ of Dedimus Potestatem would be granted to take the defendant's answer and also to examine witnesses. A certificate of the answer and testimony would then be taken into chancery. . . . Evidence verbal or written was placed on the same footing, but the chancellor compelled a petitioner to prove his case. If he deemed the evidence insufficient or conflicting, he would call for more, and no decree could be had until it was produced. There do not appear to have been any rules of evidence, nor presumptions as to the burden of proof. The whole proceeding was thoroughly informal." Finally, the fact that the chancellor, by reason of his close connection with the Council, could act with the whole force of the executive government,[6] enforcing his orders in the last resort by a commission of rebellion,[7] prevented abuses of the machinery of the Chancery, similar to those abuses of the machinery of the common law courts, which were facilitated both by the weakness of their executive power and the technicality of their procedure.

[1] Vol. ix 376-406; cp. vol. i 645-646. [2] Y.B. 9 Ed. IV. Trin. pl. 9.
[3] For the common law delays see vol. iii App. V.
[4] In the tract on the Office of Chancellor (above 272) 21, it is said—"It is the refuge of the poor and afflicted; it is the altar and sanctuary for such as against the might of rich men, and the countenance of great men, cannot maintain the goodness of their cause"; and this was the traditional view.
[5] Op. cit. 149. [6] Vol. i 399-404. [7] Ibid 406.



We shall see that these characteristics of the Chancery procedure were of the first importance in helping the chancellor to remedy defects in the subject matter of the law. But, before I can deal with this topic, I must first deal with the cases in which the Chancery procedure supplied a machinery which was wholly wanting to the common law.

(ii) *The non-existence in the common law of adequate machinery.*

Some of the cases falling under this head are of more permanent interest than many of the cases falling under the preceding head. To some extent the faults in the machinery of the common law, which gave rise, in the fifteenth century, to so many applications to the chancellor, were remedied in the course of the sixteenth century. But in many cases that machinery still remained inadequate to do complete justice to litigants. Therefore in some of the interpositions of the chancellor, based upon the non-existence of adequate machinery, we can see the germs of some of the later settled rules of equity. The principal cases falling under this head turn upon the impossibility of getting specific relief at common law, and the inadequacy of its machinery for dealing with cases which involved the taking of accounts and the administration of assets.

*Specific Relief.*—We have seen that in early days the common law courts were in the habit of giving specific relief of various kinds in connection with both real actions, and other actions which enforced rights to or affecting land.[1] But in connection with the purely personal actions no such relief could be obtained. The successful plaintiff in actions upon both contracts[2] and torts[3] could only get damages. Hence, from very early days, we get bills for the delivery up of specific chattels, against not only the persons who had taken or otherwise possessed themselves of them,[4] or to whom they had been bailed,[5] but also against third persons into whose hands they had come.[6] We get bills for the performance of specific acts—e.g. the cancellation of a document;[7] for the specific performance of contracts—e.g. to convey land in accordance with a contract of sale,[8] or a covenant to settle property on marriage;[9] or for injunctions against the commission

[1] Vol. ii 246-248. [2] Below 322. [3] Vol. iii 322.
[4] Select Cases in Chancery (S.S.) 82, 100-101, 113-114; Barbour, op. cit. 174—a case of 8 Hy. V.; Proceedings in Chancery (R.C.) ii *vii*.
[5] See a case of 1438 cited Barbour, op. cit. 112.
[6] Ibid 114 n. 4; cp. Earl of Shrewsbury v. Coland, Proceedings in Chancery (R.C.) i *xl*.
[7] Barbour, op. cit. 87-88, and cases there cited; cp. Select Cases in Chancery (S.S.) 130-131—a suit asking for partition.
[8] Ibid 122-123; cp. ibid 78-79. [9] Ibid 43-44; 137-143.

of wrongful acts[1].—Egerton said that he had seen, as early as Richard II.'s reign, a precedent of an injunction prohibiting waste, issued against a tenant for life in a case where, owing to the fact that there was a second remainder for life before the ultimate remainder in fee, there was no remedy at law.[2]

*Account.*—We have seen that the common law knew a writ of account; but that it was cumbersome in its methods and limited in its scope.[3] It was only applicable in a limited class of cases; and, as it could not be used when the transactions in question had taken place abroad, it was useless for the more important commercial transactions.[4] On the other hand the court of Chancery offered many advantages. It could both examine the parties and their witnesses, and it could join all the parties to the account in one suit.[5] Thus we are not surprised to find that, by the end of the fifteenth century, the mere fact that the case involved the taking of accounts was sufficient ground for the interposition of the chancellor.[6]

*Administration of Assets.*—Much the same reason as that which made the Chancery an efficient tribunal in matters of account, made it an equally efficient tribunal in questions relating to the administration of assets. Its procedure enabled it to do what the common law courts could not do—take a comprehensive view of the rights and liabilities of the estate and of the conduct of the personal representatives, and settle in one legal proceeding the various equities as between the personal representatives and those interested in the estate.[7] The cases are very various in character. In one case an executor sought to follow assets, entrusted by his testator to a deceased and outlawed bailiff, into the hands of a third person.[8] In other cases plaintiffs sued for the payment of debts which could not then have been enforced against the executors of a deceased person at common law.[1] In others they sought restitution for wrongs done by the deceased. A very curious bill of 1454 alleges that the late bishop of Salisbury had persecuted the plaintiff, who had been obliged to pay twenty marks to get his favour; that the bishop had directed his executors to make restitution for wrongs done; but that, this direction notwithstanding, the executors had refused to pay the twenty marks.[2] In other cases, persons entitled under the will asked that the directions of the testator should be carried out.[3] But it would seem from these scattered cases that the equitable jurisdiction over this class of business was not as yet sufficiently extensive to have produced any very settled rules. No doubt the reason is to be found in the fact that the jurisdiction of the ecclesiastical courts had not as yet become as ineffective as it afterwards became.[4]

(2) Cases which turn upon defects in the subject matter of the law.

In dealing with these cases I shall make the same division as that which I have made in dealing with the cases which fell under the preceding head. In some cases there was a failure to apply the law, or it was actually abused; in others no adequate rules of law existed.

(i) *Failure in the application or abuse of the rules of law.*

The turbulence of the country during this period effectually prevented the rules of law from being properly applied. Hence among the Chancery proceedings we get very numerous bills complaining of criminal or tortious acts which the law prohibited, but was powerless to prevent. We get complaints of duress,[5] champerty,[6] violent disseisin,[7] assaults and affrays,[8] forgery of deeds,[9] rescue from arrest,[10] piracy,[11] and of what was then an offence of ecclesiastical cognisance—witchcraft.[12] These complaints are very numerous, and two short illustrative cases will

[1] Select Cases in Chancery (S.S.) 20-21, and see n. 3 p. 21; Proceedings in Chancery (R.C.) i *lxii*, iii—to stay waste; cp. Spence, op. cit. i 671-672.

[2] Moore (K.B.) 554 pl. 748—"Tenant pur vie, le remainder pur vie, le remainder ouster en fee, per que le wast en le primer tenant pur vie est dispunishable per le common ley: uncore ad estre decree en Chancery per l'advice des Judges sur complaint de cestuy en remainder en fee, que le primer tenant ne faire wast, et injunction la grant."

[3] Vol. iii 426-427; below 315-316; cp. Select Cases in Chancery (S.S.) 100-101.

[4] Above 117-119.

[5] The earliest case seems to be one of 1385, Select Cases in Chancery (S.S.) 1—as a matter of fact it was within the common law jurisdiction of the chancellor, vol. i 452-453, as the defendant was a clerk of the Chancery; but the two jurisdictions were not so separate then as they afterwards became, ibid 449-452; cp. Barbour, op. cit. 82-84.

[6] "In the early cases the complainant usually assigns his poverty, or inability to get hold of the defendant by common law process, as the occasion for coming to Chancery; but at length the subject matter of an account itself was treated as a sufficient cause," ibid 16.

[7] Vol. iii 591.

[8] Select Cases in Chancery (S.S.) 131-132—the bailiff had spent £10 of the testator's money in the purchase of land; the vendor had got the £10 and had not conveyed the land.



[1] Barbour, op. cit. 102-105; for the common law see vol. iii 576-583; cp. Vavasour v. Chadworth, Proceedings in Chancery (R.C.) i *xciii*—repayment of a loan to a deceased person from his executors.

[2] Select Cases in Chancery (S.S.) 136-137; cp. Hylton v. Pollard, Proceedings in Chancery (R.C.) i *l*, *li*.

[3] Select Cases in Chancery (S.S.) 143-150; Polgrenn v. Feara, Proceedings in Chancery (R.C.) i *xxxix*—refusal by executors to give up goods to a son; Bebington v. Gull, ibid i *lvi*—neglect to found a charity according to a will; Wilflete v. Cassyn, ibid ii *xxxiii*—for delivery of chattels left by will.

[4] Vol. iii 591-594.

[5] Select Cases in Chancery (S.S.) 8-10.

[6] Ibid 71-72.

[7] Ibid 76-77.

[8] Proceedings in Chancery (R.C.) ii 1.

[9] Ibid ii *xxx*, *xxxi*.

[10] Ibid ii *v*, *vi*.

[11] Ibid i *xii*.

[12] Martin, Archæologia (2nd series) vol. 10 Pt. II. 374-378; cp. Select Cases before the Council (S.S.) xxxiv-xxxv; for witchcraft generally see vol. iv 507-511.

suffice. The first is an ordinary typical case of riot and assault.[1] John Chambre of Northampton complained that Ralph Grevill had riotously entered his manor of Hanwell with many other misgoverned persons "arrayed in forcible manner with jackys, salattis, lange-debeffys, launce-gaiys, and many other forbidden weapons," driven out his tenants, and taken away his cattle; that, on one of the tenants coming to demand the cattle, he had beaten and wounded him so that his life was despaired of; and that, on the plaintiff's suing out writs of repelvin, he had threatened that he would make the server of the writ eat them. The second is a rather more curious case.[2] One Henry Hoigges, the plaintiff, alleged that he had acted as attorney to Richard Flamank in a suit against the Prior of Bodmin; and that, in consequence, a priest and servant of the prior, by name John Henry, bewitched him so that he broke his leg and his life was in danger. Further, he had threatened by similar diabolical means to break the plaintiff's neck. The plaintiff asks the chancellor's help not only on his own account, but on account of the great harm that would be done to all suitors and attorneys in the king's courts if this sort of conduct was allowed to pass. He thinks that the defendant should be punished, and made to swear that he will "forsake his heresy witchcraft and sorcery."

The actual abuse of, as distinct from the failure in the application of the rules of law, is not quite so common as the actual abuse of the rules of procedure. But there are one or two clear cases. A curious case comes from the reign of Edward IV., in which a decree was made in favour of the plaintiff.[3] It appears that one John Causton was farmer to Lord Bourchier and owed him money. The plaintiff Henry Astell, citizen and draper of London, was owed money by Lord Bourchier. By arrangement between the parties it was agreed that John Causton should enter into obligations to pay Lord Bourchier's debt to Astell. But Causton refused to fulfil this agreement unless Astell would enter into counter bonds for the same sum, conditioned to be void if Astell saved him harmless against any claim by Lord Bourchier. These counter bonds with this condition were entered into by Astell. The result was that Astell found himself in effect swindled out of his money; for, as Lord Bourchier had now no claim against Causton, the condition of Astell's bond, that if he saved him harmless against claims by Lord Bourchier the bond should be void, was impossible and therefore void.[4] In effect Astell's

[1] Proceedings in Chancery (R.C.) ii *xxxii*. [2] Ibid i *xxiv*.
[3] Astell v. Causton, ibid *cviii-cix*.
[4] "If an obligation be endorsed with a condition impossible, the obligation is good and the condition is void," Perkins, Profitable Book § 753.



counter-bonds were absolute; and therefore he had no answer to the action which Causton was bringing upon these counter-bonds. But the commonest class of cases in which the law was abused is to be found in the law relating to villein status.[1] The bills of this period show that it was made the pretext for all sorts of violence and extortion. I will give two instances out of many. The following is a bill of Richard II.'s reign[2]:—"Beseecheth a poor man, William son of John Calne, that whereas he is of free estate and condition, and he and all his ancestors time out of mind are and have been of the same condition . . . now then cometh one John Shortegrove, farmer of certain lands and tenements from one George Belamy, and claimeth the said William as his villein appurtenant to the said lands and tenements, and he hath seized and arrested the said William at Upton in the county of Hereford, and hath brought him from that county into Wales, and there keepeth him in a strong and hard prison." Another bill of 1464[3] alleged that the suppliant had been carried off and imprisoned till he entered into a bond to bring up a sufficient number of persons to prove that he was free. He brought forty such persons. But the defendant and his friends drove them off with arrows. Twelve months after the suppliant was again imprisoned, but he escaped to London. He dare not go home again, and asks for the chancellor's intervention.

(ii) *The non-existence or inadequacy of the rules of law.*

Some of these cases possess the same permanent interest as the cases which fall under the head of the inadequacy of the machinery of the common law. In both sets of cases we can see the germs of some of the later rules of equity.

By far the most important class of these cases is that relating to uses and trusts with which I have already dealt.[4] The court of Chancery had begun to develop a far more definite, a far more systematic set of rules upon this topic than upon any other. And the fact that it had done so illustrates how closely equity followed the common law—supplementing it and correcting it. The land law was the most highly developed branch of the common law, and suffered the most from that premature fixity of the common law which had promoted technicality at the expense of reasonableness. It was only natural, therefore, that it should be in connection with this branch of the law that the rules of equity should most quickly develop.

Here I shall illustrate from the proceedings of the court during

[1] Vol. iii 502-505. [2] Select Cases in Chancery (S.S.) 80-81.
[3] Ibid 151-153; see also ibid 110-111, 154-155; Proceedings in Chancery (R.C.) i, ii, iii; xlii.
[4] Vol. iv 407-480.

this period one or two other branches of the law in which the absence or inadequacy of existing legal rules were supplemented by equity. I shall deal with them under the following heads:—Fraud, Mistake, Accident, and Forgery; Relief against Penalties; Contract in general; Contracts of Sale; Agency and Partnership; Suretyship and Indemnity; the ownership of Chattels; the Assignment of Choses in Action.

*Fraud, Mistake, Accident, and Forgery.*—The scope of the action for deceit was very limited;[1] and it was not till the growth of actions for deceit on the case that the common law began to get some clear notions of the nature of fraud.[2] In fact the common lawyers at this period had no adequate machinery for trying questions of fraud. For a long time therefore they held to the primitive view that "the thought of man is not triable";[3] and, if they were obliged to consider any question of fraud, they invented arbitrary rules according to which they would imply fraud from various sets of external facts.[4] Nor was a plea of fraud of any avail at this period as a defence to an action for breach of contract. Till the growth of assumpsit, covenant was the only purely contractual action, and to it fraud was no defence.[5] On the other hand, the power of the chancellor to examine the defendant and other witnesses, made the court of Chancery a very competent tribunal to deal with these questions. A very early case tells us how it was agreed that an attorney should pay over twenty marks in gold in return for a release, and how he got the release and kept the money.[6] In another case the complaint is that a condition which was to have been inserted in a bond had been fraudulently left out.[7] In Henry VI.'s reign relief against a bond and a conveyance was asked on the ground that the plaintiff, who was of weak intellect, had been made drunk.[8] In Edward IV.'s reign a bill to set aside a deed made to defraud creditors was successful.[9] Similarly the court relieved against mistakes made by reason of the ignorance or inadvertence of the parties—Deus est procurator fatuorum.[10] Illustrations of the exercise of this jurisdiction are cases in which a debtor had paid without taking an acquittance,[11] or in which a collateral agreement, not appearing upon the face of the document sued upon, had

[1] Vol. iii 407-408. [2] Below 416-417. [3] Vol. iii 374, 375.
[4] See vol. iv 481-482 for the interpretation of Elizabeth's statutes against conveyances in fraud of purchasers and creditors.
[5] Barbour, op. cit. 23.
[6] Select Cases in Chancery (S.S.) 2-3—the date is 1386.
[7] Martin, op. cit. 8-9.
[8] Stonehouse v. Stanshawe, Proceedings in Chancery (R.C.) i *xxix*.
[9] Y.B. 16 Ed. IV. Pasch. pl. 9; cp. Spence, op. cit. 624 n. *b*.
[10] Y.B. 8 Ed. IV. Pasch. pl. 11.
[11] Barbour, op. cit. 85-88.



been proved,[1] or in which it was proved that the consideration had wholly failed.[2] Similarly the court would relieve against the loss of a document arising from accident; and, if the contents of the document could be proved, allow an action to be brought upon it.[3] In connection with all these kinds of relief the court exercised large powers of cancellation or rectification of documents.[4] The unsatisfactory nature of the law as to forgery in the fifteenth century made the interposition of the chancellor obviously necessary.[5] Thus in Henry VI.'s reign there is an application to recover lands alleged to have been obtained by means of a forged deed.[6]

*Relief against Penalties.*—We cannot as yet distinguish in clear outline that jurisdiction to relieve against a penalty because it is a penalty which equity will apply in later days. But we can see some of its roots. It was obviously against conscience that a person should recover a sum of money wholly in excess of any loss incurred. A person seeking to do so might in some circumstances come perilously near to committing a fraud, and in other circumstances might be unconscientiously seeking to take advantage of an accident. Thus Barbour says,[7] "It seems to have been not uncommon that a debtor, 'for further security,' should bind himself in double the amount of the actual debt; he might pay the debt, and still the creditor, armed with his sealed writing, could collect the full sum named in the deed; for the common law received such evidence as conclusive. The debtor's only resource was in the subpœna." Already we begin to see these principles applied in relief of mortgagors. In a case of 1456[8] a mortgagor, who had been fraudulently induced to execute a Statute Merchant, was relieved and the Statute cancelled. In Edward IV.'s reign Pigot seemed to think that, if money lent on the security of land were paid, the Chancellor could order a reconveyance of the land.[9] But as yet the limits of and the principles upon which this jurisdiction is exercised are vague. We have not as yet reached anything that can be called an equity of redemption. A case of Edward IV.'s reign,[10] in which a mortgagor alleged that he had overpaid the mortgagee, ended in a decree awarding the mortgaged property to the mortgagee.

[1] Barbour, op. cit. 94, 95. [2] Ibid 96-97. [3] Ibid 101-102.
[4] Ibid 87, 88, 123, and cp. Astell v. Causton, above 290-291—all illustrations of cancellation; Barbour, op. cit. 94, 95—cases of rectification in accordance with a subsequent agreement.
[5] Vol. iii 400; vol. iv 501-502.
[6] Walker v. William, Proceedings in Chancery (R.C.) ii *xxx*.
[7] Op. cit. 89. [8] Select Cases in Chancery (S.S.) 137-141.
[9] Y.B. 9 Ed. IV. Trin. pl. 34, cited Spence, op. cit. 602.
[10] Broddesworth v. Coke, Proceedings in Chancery (R.C.) i *lxvii-lxviii*.

*Contract in General.*[1]—We have seen that, until the development of the action of assumpsit, the only purely contractual action known to the common law was the action of covenant which lay only on a sealed writing.[2] At the beginning of the fifteenth century assumpsit was in substance an action of tort, and lay only for a misfeasance committed in breach of an undertaking.[3] It was not till the beginning of the sixteenth century that it was extended to cases in which a person had changed his position on the faith of an agreement, and had been damaged by the non-performance of the agreement.[4] It was not till the latter part of that century that assumpsit was available for the enforcement of purely executory contracts.[5] In the fifteenth century, therefore, it was clear that the common law was only prepared to enforce a very limited number of executory contracts; so that it was inevitable that applications should be made to the chancellor. But, as he could not enforce all agreements, he must find some test to distinguish between an agreement and a contract. What that test was is by no means clear. Apparently all that we can say is that the plaintiff must show that, in the circumstances, it was reasonable that the agreement should be enforced, and that it would be unconscientious if the defendant did not fulfil his undertaking. It is obvious that this is a vague test. It involves an inquiry into the circumstances under which the agreement was made. We must ask, Whether any change has taken place in the position of the parties as the result of the agreement? What was the object of the agreement? Was it an object—such as charity or marriage—which it was a matter of public policy to further? Did the parties seriously intend to contract? The result is that, as Barbour says, "it is impossible to determine absolutely the ground upon which Chancery proceeded."[6] The Doctor and Student, however, makes it probable that the test to distinguish agreement from contract, which the chancellors had at the back of their minds, was derived from the canonist idea of *Causa*,[7] which is the ancestor of the continental *Cause*.[8] The Doctor is made to say:[9] "First thou shalt understand that there is a promise that is called an Advow, and that is a promise made to God, and he that doth make such a vow upon a deliberate mind intending to perform it, is bound in conscience to do it, though it be only made in the heart without pronouncing of words; and of other promises made to man upon a certain consideration, if the

[1] On this topic generally see Barbour 150-168.
[2] Vol. iii 420, 423-424.
[3] Ibid 429-434.
[4] Ibid 434-441.
[5] Ibid 444-446.
[6] Op. cit. 167.
[7] Vinogradoff, Reason and Conscience, L.Q.R. xxiv 381-382.
[8] Vol. iii 412, 413.
[9] Bk. ii c. 24.



promise be not against the law: as if A promise to give B £20 because he hath made him such a house . . . I think him bound to keep his promise. But if his promise be so naked, that there is no manner of consideration why it should be made, then I think him not bound to perform it, for it is to suppose that there was some error in the making of the promise: but if such a promise be made to an University, to a city, to the church, to the clergy, or to poor men of such a place, and to the honour of God, or such other cause like, as for maintenance of learning, of the commonwealth, of the service of God, or in relief of poverty or such other, then I think that he is bound in conscience to perform it, though there be no consideration of worldly profit, that the grantor hath had or intended to have for it: and in all such promises it must be understood that he that made the promise intended to be bound by his promise, for else commonly after all Doctors he is not bound, unless he were bound to it before his promise. As if a man promise to give his father a gown that hath need of it to keep him from the cold, and yet thinketh not to give it him, nevertheless he is bound to give it, for he was bound thereto before. And, after some Doctors, a man may be excused of such a promise in conscience by casualties that cometh after the promise, if it be so that if he had known of the casualties at the making of the promise he would not have made it. And also such promises if they shall bind, they must be honest lawful and possible, and else they are not to be holden in conscience, *though there be a cause, etc.* And if the promise be good and *with a cause*, though no worldly profit shall grow thereby to him that maketh the promise, but only a spiritual profit, as in the case before rehearsed of a promise made to an University, to a City, to the Church, or such other, and *with a cause* as to the honour of God, then is most commonly holden that an action upon those promises lyeth in the Law Canon."

This passage makes it clear the chancellor approached the subject from a point of view very different from that of the common law judges. He started from the premise that an agreement, because it was an agreement, ought *prima facie* to be enforced; and no doubt the ecclesiastical chancellors, starting from the broad premise that *laesio fidei* ought to be redressed, arrived very easily at this conclusion. It is clear that this liberal idea was a most useful corrective to the very rigid ideas of the common lawyers; it is probable that it had a very large influence in inducing them to extend the sphere of assumpsit;[1] and there cannot be much doubt but that the frequent allegations made by plaintiffs that they had changed their position on the faith of the making

[1] Vol. iii 436, 442, 447.

of the undertaking, helped the common lawyers to arrive at this test of the enforceability of an agreement.[1] But it is not probable that the canonist ideas had any more direct influence upon the theory of contract eventually worked out by the common law. The Student will have none of the Doctor's subtleties. He says[2]:—"Of the intent inward in the heart, man's law cannot judge, and that is one of the causes why the law of God is necessary (that is to say) to judge inward things, and if an action should lie in that case in the law Canon, then should the law Canon judge upon the inward intent of the heart, which cannot be as meseemeth. And therefore after divers that be learned in the laws of the realm, all promises shall be taken in this manner, that is to say, If he to whom the promise is made have a charge by reason of the promise, which he hath also performed: then in that case he shall have an action for that thing that was promised, though he that made the promise have no worldly profit by it." The impulse to extend the sphere of the enforceable agreement came from the Chancery; but the technical method by which that extension was made was the gradual enlargement of the scope of a common law action. Hence the test of the enforceability of agreements eventually came to be the sum of the conditions under which that action would lie.[3] That is the essence of the doctrine of consideration. And, as the test of consideration, thus evolved by the common law, came to be the test eventually accepted by equity,[4] the canonist theory ceased to affect directly either law or equity. Here, as in other branches of the law, foreign influences inspired native developments, but they did not prevent these developments from being essentially native.

I do not mean to belittle the influence of the ideas suggested to the ecclesiastical chancellors by the canon law. That influence showed the common lawyers that it was necessary to enlarge their ideas as to the enforceability of agreements, and therefore set them to search for some test to distinguish between agreements which were enforceable and those which were not. From this point of view, therefore, it may be said that the ideas drawn from the canon law and the practice of the ecclesiastical chancellors, were the greatest of the forces which inspired the common lawyers to create the most distinctive of all the features of the English law

[1] Barbour, op. cit. 118-119; he there says that in the majority of petitions relating to contracts for the sale of land which he has examined this allegation is made; but it is probable from the Doctor and Student that Barbour is right when he says that this was not a condition precedent for recovery, but only an "aggravating circumstance"; the Doctor states the wider canonist doctrine, the Student the doctrine of detriment incurred on the faith of the making of the undertaking worked out by the common lawyers; vol. iii 435, 440-441.

[2] Doctor and Student, Bk. II. c. 24.

[3] Vol. iii 428-453.

[4] Below 321-322.



of contract—the doctrine of consideration. And the influence of these ideas and this practice did not stop here. Directly they influenced the growth of special varieties of contract. Indirectly, by inducing the common law to apply to other departments of law the flexible action on the case, they inspired many developments both in the law of property and in the law of tort. To some of these developments, which were foreshadowed by the equity of this period, we must now turn.

*Contracts of Sale.*—We have seen that the contract of sale of goods was well known to common law of this period, and that it had already acquired its main distinctive feature—the fact that the property passed when the contract was concluded.[1] But, even after assumpsit was more fully developed than it was during this period, the common law remedies for sales by owners with defective titles, and for sales of articles of bad quality, were not adequate; and these defects were the cause of applications for the intervention of the chancellor.[2] In the case of contracts for the sale of land there were other and stronger reasons for the same intervention. The strongest and most permanent of these reasons was the power of the Chancery to decree specific performance.[3] Other reasons can be found in the fact that equity could, when the land was settled to uses, deal effectually both with feoffees to uses and cestuique use;[4] and that in a suitable case it could order recission of the contract, and compensation for any expenses which the plaintiff had incurred.[5]

*Agency and Partnership.*—The common law of agency was rudimentary, and, as we shall see, it continued to be rudimentary till, in the seventeenth century, the common law began to acquire some new ideas from the merchants whom it was seeking to attract to its tribunals.[6] It would seem that at this period the chancellor helped to introduce some of the more advanced ideas of the law merchant on this topic. At common law it was originally necessary to show that the principal had authorized, or had expressly or impliedly ratified, the specific contract.[7] But the chancellor held a principal liable if goods were supplied to his known agent;[8] and the common law soon followed suit.[9]

[1] Vol. iii 354-357.

[2] Barbour, op. cit. 115, 116.

[3] Above 287-288; Barbour, op. cit. 121—a petition of the chancellor of the University of Cambridge of about 1433 who had contracted to buy land to found a college.

[4] Barbour, op. cit. 120, 121-122; vol. iv 430-443.

[5] Ibid 123.

[6] See vol. viii 222-229 for the history of agency.

[7] Vol. iii 383-385.

[8] Barbour, op. cit. 131.

[9] Y.B. 8 Ed. IV. Mich. pl. 9 (p. 11) *per* Pigot.

Similarly the chancellor was prepared to protect an undisclosed principal.[1] It is quite probable that the chancellor's action helped forward the development of the common law ideas on this topic, and so helped the common lawyers to appropriate jurisdiction over the law of agency. We find one or two simple cases of partnership, similar to those which were brought in the mercantile courts.[2] The plaintiff generally asked that his partner should account. The common law action of account was, as we have seen,[3] available for this purpose; but its defects made it an inconvenient remedy. Obviously the adjustment of the relations between partners inter se demanded a procedure which could deal with administrative business. Therefore partnership, like administration of assets, eventually came to be principally developed by equity.

*Suretyship and Indemnity.*—It was not till Henry VIII.'s reign that these contracts became enforceable at law by the action of assumpsit.[4] Therefore we are not surprised to find that in the fifteenth century both these contracts were brought before the chancellor. Thus we get suits by creditors against sureties,[5] and by sureties who complained that the creditor was suing them before the principal debtor.[6] The contracts of indemnity which came before the chancellor were generally contracts in which two debtors had become jointly bound to a creditor, the first debtor having expressly or impliedly promised to indemnify the other.[7] When the action of assumpsit became available to enforce the contracts of suretyship and indemnity it fully met the case of the contract of indemnity. But in the case of the contract of suretyship equity still continued to supplement the law. The continuing relations between the three parties to the contract gave rise to equities arising out of their conduct which only the court of Chancery could enforce. Thus the effect upon the surety's rights of an enlargement of time given by the creditor to the principal debtor,[8] and the surety's right, on payment, to the securities held by the creditor,[9] were incidents of the contract settled at a later period by equity.

*The Ownership of Chattels.*—Even though, at the beginning of the fifteenth century, detinue lay for the recovery of chattels which had been bailed or had involuntarily left the possession of the owner,[10] it was for many reasons an inconvenient action.

[1] Barbour, op. cit. 132.
[2] Ibid 128-130; above 111.
[3] Above 288 n. 3.
[4] Vol. iii 440.
[5] Barbour, op. cit. 133-134.
[6] Ibid 134.
[7] Ibid 135-137.
[8] Y.B. 9 Ed. IV. Mich. pl. 26; and cp. Spence, op. cit. 638.
[9] Ibid 639.
[10] Vol. iii 324-328, 337, 348-350.



No specific restitution could be had; and the action gave no remedy if the thing was damaged. If detinue was brought on a bailment the action must, in the fourteenth century,[1] have been brought against the bailee himself or some one in privity with him, for instance his heir or executor; and wager of law was sometimes possible.[2] These defects drove plaintiffs to the Chancery;[3] and the action of the Chancery in these cases no doubt helped forward the development of the action on the case based on a trover and a conversion,[4] just as in the sphere of contract it helped forward the development of assumpsit.

*The Assignment of Choses in Action.*[5]—The common law never allowed a chose in action to be assigned; and, till the development of assumpsit, it was impossible to circumvent this rule by a novation. But, from an early period, the court of Chancery permitted the assignment of a debt, and recognized a novation. Barbour has collected three clear instances of an assignment,[6] two instances of a novation,[7] and three instances which might conceivably be treated as either one or the other.[8] Right down to the Judicature Acts, apart from negotiable instruments adopted from the law merchant into the common law,[9] it was only in equity that these assignments were recognized.

The large amount of ground thus covered by equity in the fifteenth century constitutes a very damaging indictment of the mediæval common law. Some of its faults were capable of being remedied, and were to some extent remedied, in the sixteenth and early seventeenth centuries. The mediæval common law was then giving place to the modern common law. Necessarily, therefore, the field of equity tended to shrink; and, as at the same time the court of Chancery and its procedure were assuming their modern form, we begin to see, both in the extent and in the character of the rules of equity, the beginnings of our modern system. This development we must now consider.

## The Sixteenth and Early Seventeenth Centuries

Throughout this period the development of a systematic body of equitable rules was proceeding; but the process was only beginning; and therefore we find that their subject matter was still to some extent determined by the defects of the common law. That this was so can be seen from the views expressed by

[1] Vol. iii 348-349.
[2] For these defects generally see Barbour, op. cit. 113-114.
[3] See ibid 111-112 for some cases.
[4] Vol. iii 350-351; Pt. II. c. 2 § 1.
[5] See vol. vii 532-539 for the history of the law on this topic.
[6] Op. cit. 108.
[7] Ibid 110.
[8] Ibid 109.
[9] Vol. viii 159-176.

the chancellors themselves. Bromley, as we have seen, warned a batch of newly created serjeants, "not to bring causes hither to this court upon false surmises."[1] Hatton, on a similar occasion, gave a similar warning;[2] and Bacon, enumerating the defects of the law, assigned as one of them, "that the Chancery courts are more filled, the remedy of law being often obscure and doubtful."[3]

But many of the defects and weaknesses of the common law of the fifteenth century had been remedied in the course of the sixteenth century. Consequently we can see a tendency towards the placing of some limitations upon the indefinite sphere of equitable jurisdiction. The nature of and the reasons for these limitations may be summed up as follows: Firstly, the lawlessness of the fifteenth century, which had been the occasion of so many petitions to the chancellor, was being gradually checked by the Council and the Star Chamber. As we have seen, their work was twofold. They increased the efficiency of the criminal law directly, by assuming jurisdiction over certain offences;[4] and indirectly, by rendering more efficient the exercise of the criminal jurisdiction of the common law.[5] At the same time cases of outrage occasionally came before the court of Chancery right down to the end of Elizabeth's reign,[6] and cases of forcible seizure of property as late as Charles I.'s reign.[7] Throughout this period also we have applications for writs of certiorari and habeas corpus with a view to remedy oppression by local courts and officials.[8] But it is clear that this jurisdiction is on the decline. The punishment of outrages and violent disseisin was generally left to the Star Chamber.[9] Applications for writs of certiorari and habeas corpus were not granted as of course;[10] and, when the common law courts showed that they were capable of doing justice in such cases, these applications gradually ceased to be made to the chancellor. Similarly, encroachments upon the ecclesiastical

[1] Above 229 n. 13. [2] Sanders, Orders ii App. 1036.
[3] Spedding, Letters and Life vi 64.
[4] Above 197-214. [5] Above 190-197.
[6] Spence, op. cit. i 687; vol. i 406.
[7] Spence, op. cit. i 688-689—"It appears from the registrar's books, that down to the time of Charles I., it was seldom that the Court of Chancery had not to interfere with its coercive powers, in respect of some forcible seizure of the property which was the subject of the litigation, or to insure the quiet enjoyment to the party who was declared to be entitled to it."
[8] Ibid i 687.
[9] Wakeman v. Smith (1584-1585), Tothill 12—"Though criminal causes are not here to be tried directly for the punishing of them, yet incidentally for so much as concerneth the equity of the cause, they are to be answered"; apparently in 1639 the court refused to hear a case because it was "of a penal and criminal nature," Manning v. Freake, ibid 139.
[10] Sanders, Orders i 8—Wriothesley; 10—Riche; 26, 33—Nicholas Bacon; 70—Puckering; 112, 120—Francis Bacon.



jurisdiction over probate of wills[1] and divorces,[2] and upon the Admiralty jurisdiction over depredations at sea,[3] also ceased. Secondly, some of the additions made by statute to the criminal law had a similar effect. Elizabeth's statute as to perjury[4] is a good illustration. The practice as to giving relief on the ground of perjury fluctuated during Elizabeth's reign;[5] but in the course of the seventeenth century, the chancellor ceased to entertain bills for perjury. Thirdly, the growth of actions on the case, by rendering procedure more uniform and simple, tended to render obsolete many of the technicalities which lawless or fraudulent persons had turned to their own uses.[6] The disuse of such older methods of trial as wager of law had a similar effect.[7] Fourthly, the development by the common law of a system of written pleadings,[8] and the fact that it was beginning to acquire a law of evidence,[9] enabled it to do more substantial justice than in the preceding period. And, in the latter part of the seventeenth century, the powers which it assumed to order a new trial where the verdict was unreasonable,[10] and to change the venue in civil[11] or criminal cases,[12] if it was clear that a fair trial could not be had, obviated the necessity for the chancellor's interference in these cases. Fifthly, the common law was beginning to possess an adequate law of contract,[13] and to give an adequate protection to the owners of chattels.[14] The development of assumpsit and trover supplied remedies for many wrongs formerly unremedied or only partially remedied by the common law. Therefore an appeal to the chancellor was only needed if something more than the common law remedy of damages was required.[15] Sixthly, this last development, coupled with the fictions by which the difficulties arising from the law as to venue were got over,[16] enabled the common law courts to divide with the Admiralty the mercantile

[1] Tothill 188; Monro, Acta Cancellaria 761.
[2] Tothill 61 says that two decrees for divorce are recorded, but Spence, op. cit. i 702, says—"I have been unable to discover them even with the help of Mr. Monro."
[3] Spence, op. cit. i 703. [4] Vol. iv 518.
[5] Nicholas Bacon dismissed so much of a bill as related to perjury, Spence, op. cit. i 69 n. *c*; but there is an instance of a person being punished for perjury in 1573, ibid; we have bills for perjury in 1576-1577, Cary 63-64; and in 1579, ibid 75-76; and for other cases cp. Tothill 156-157; but in 1570 the Queen's Bench resolved that any examination of perjury by the Chancery must be by Latin Bill, and the trial after issue must be in the Queen's Bench, i.e. these cases belonged to its common law and not to its equitable jurisdiction; perjury is not mentioned as part of the common law jurisdiction of the court in 1 Eq. Cas. Ab. 128.
[6] Below 381, 382; cp. vol. iii 626-627. [7] Cp. Spence, op. cit. 696.
[8] Vol. iii 640-653. [9] Vol. ix 127-222. [10] Vol. i 225-226.
[11] Isley v. Pelham (1591), Monro, op. cit. 621.
[12] An application of this sort is recorded as late as 1684, see Tyrringham's Case, cited 1 Vern. 439; Spence, op. cit. i 699.
[13] Vol. iii 434-450; vol. viii chap. iii.
[14] Vol. iii 350-351; vol. vii 402-421.
[15] Below 321-325. [16] Above 140-143.

business of the country. The Admiralty and the common law courts thus took from the Chancery many commercial cases which had come before it in the earlier period.

In these ways and for these reasons a good deal of business was ceasing to come to the court of Chancery. But necessarily the process was gradual. Throughout the seventeenth century, and especially during this period, we occasionally meet with cases which are reminiscent of the past rather than of the future history of equity. They gradually ceased as the common law improved; and consequently the equitable jurisdiction of the chancellor gradually assumed its modern form.

This curtailment of the sphere of the equitable jurisdiction was a powerful factor in the systematization of the principles of equity. That this process of systematization was beneficial to the litigant is obvious; and it is equally obvious that it was a vital necessity to the continuous existence and development of equity itself. But it had its weak as well as its strong side. It was the procedure of the court of Chancery that first became thus systematized; and, as we have seen, it soon began to exhibit the defects of length, expense, technicality, and even corruption,[1] which prevented the court from doing that cheap and speedy justice which it had done in the preceding period. If the common law was to some extent levelled up, equity was to at least an equal extent levelled down. Though the court still continued to hold itself out as the protector of the poor,[2] suitors ceased to be able to appeal to equity against the delay and expense of the common law—if they did they often found themselves "out of the frying pan into the fire."[3] And here, too, we see the weak side of the victory of the Chancery over the common law—a victory which was, as we have seen, a condition precedent for the free and continuous development of equity.[4] The efforts of the chancellor to stop the abuses of injunctions against proceedings at common law[5] did not succeed; and, in spite of repeated orders[7] and decisions,[8] litigants attempted to get injunctions and

[1] Vol. i 424-428; cp. Dasent xxii 144-145 (1591), 235, 250 (1591-1592), 494, 495-496 (1592), for complaints of delays in the Chancery; and see ibid 377 (1592) for complaints of fraudulent practices of the under clerks.

[2] Monro, op. cit. 108; below 337 n. 4.

[3] See Dasent xv 398, 405 (1587-1588) for a case in which vexatious suits had been begun in both the Chancery and the King's Bench.

[4] Above 236-238.

[5] For Hatton's address to a newly created serjeant on this topic see above 226 n. 3; cp. Bacon's speech, Spedding, Letters and Life vi 185-186; and his Orders nos. 20-28.

[6] Vol. i 465.

[7] Sanders, Orders i 29—Nicholas Bacon; ibid 69—Puckering; ibid 111 no. 15—Francis Bacon.

[8] Monro, Acta Cancellaria 59 *n.* 92 (1608), 119 (1609), 313-314 (1623); cp. Cary 74, 82, 83; Choyce cases 121, 135; Tothill 80.



otherwise to use the Chancery[1] for the most trifling causes. And thus another method of adding to the delay and expense of litigation was put into the hands of the rich and unscrupulous litigant.

The sphere of the chancellor's jurisdiction was curtailed, but the business of the court continued to increase. The prosperity of the country was growing, with the result that life was growing more complex; and so more detailed rules were needed to guide the new activities and relationships which were emerging. Thus the chancellor had abundant opportunities for developing a set of principles and rules applicable to the various pieces of jurisdiction which he still retained. That he took these opportunities we shall see if we look at the manner in which he developed the principles of equity during this period.

In dealing with these developments I shall first speak of the development of the law as to Trusts. Throughout the history of equity this branch of the equitable jurisdiction has been by far the most important; and its principles have permeated many other branches of that jurisdiction. These trusts were in very many cases connected with marriage settlements or wills. The chancellor, in adjudicating upon them, was compelled to consider many problems of family law. To this branch of law, which was as yet very scanty, he thus made considerable additions. With some of these additions I shall deal in the second place. These two branches of the equitable jurisdiction presuppose a machinery capable of administrative work. The possession of this machinery naturally attracted other branches of jurisdiction to which such machinery was essential. Some of these begin to emerge during this period, and with them I shall deal in the third place. Fourthly, all these branches of jurisdiction presupposed a power to give in a suitable case a certain measure of specific relief; and we have seen that from the earliest period the chancellor had attempted to give this relief.[2] The cases in which it would be given were beginning during this period to be reducible to certain categories. Fifthly, there is still a somewhat indeterminate list of cases in which equity gave relief against the rigidity of the law. They have not yet become distinct branches of the

[1] In the case of Bristowe v. Phillips (1609), Monro, op. cit. 115-116, master Grimeston certified that the matter in question was only a debt of £9, "which if the complainant do refuse or forbear speedily to pay and discharge, then I think the defendant is not to be restrained to take his remedy, by suing the obligation at the common law; and the rather, for that Honourable Court doth not use, or, by the dignity thereof, ought to admit the commencing of, or proceeding of, suits for so mean or petit sums or values"; cp. Dutton v. Philcocks (1565), ibid 355; Johnes v. Morgan (1565), ibid; Metcalfe v. Brough (1565), ibid 357-358; Browne v. Tachell (1566), ibid 359; Harbarde v. Readinge (1566), ibid 362.

[2] Above 287-288.

equitable jurisdiction; but we can see that some of them were developing in this direction. We shall see, in the following section, that these developments have begun to affect the character of Equity.

*Trusts.*

We have seen that one result of the Statute of Uses, was to transfer from the court of Chancery to the courts of common law, jurisdiction over all that numerous class of cases in which A. was seised of an interest in land to a passive use in favour of B.[1] But we have seen that there were a number of cases to which the statute did not apply.[2] It did not apply to active trusts, to trusts of pure personalty, or to trusts of a term of years. We can find instances in the reports in which equity dealt with all these varieties of trusts.[3] And it is probable that one of the results of the Statute of Uses was to increase the importance of trusts of long terms of years. By the machinery of long terms of years the king's rights over land held of him by knight service in chief could be evaded, and provision could be made by marriage settlement for widows and younger children.[4] Therefore, although the equitable jurisdiction over trusts had been diminished by the Statute of Uses, it showed, towards the end of this period, distinct signs of recovery; and in the cases decided, partly on the old principles applicable to uses, and partly on new principles, we can see the beginnings of the modern law as to trusts. We shall see that this competition of the court of Chancery had some influence on the manner in which the common law courts moulded the incidents of the new legal estates in the land—the shifting and springing uses and executory devises—which had come into the common law as the result of the enactment of the Statute of Uses and the Statute of Wills.[5]

In the following directions we can see the beginnings of some of the modern rules of equity on this topic.

(1) We begin to see the modern classification of trusts. At the present day they are divisible, according to the objects for which they are created, into charitable or private trusts; and private trusts, from the point of view of the manner of their creation, are divisible into express trusts, implied or presumptive trusts, and constructive trusts. This classification does not, it is

[1] Vol. iv 464. [2] Ibid 463.

[3] *Active Trust*, Cary 10, 11, citing Crompton 48b; *Trust of pure personalty*, Game v. Hoe (1628-1629), 1 Ch. Rep. 27-28; Bracken v. Bentley (1636-1637), ibid 110-111; *Trust of a term*, Cary 11, citing Crompton 65a.

[4] See e.g. Lyddal v. Vanlore (1626-1627), 1 Ch. Rep. 9-13: Earl of Newcastle v. Earl of Suffolk (1630-1631), ibid 50-52; below 306.

[5] Vol. vii 121-134.



true, emerge till 1676;[1] but it will be clear from the following cases that its foundations were laid during this period.

In the case of a charitable trust, the court,[2] after a little hesitation, followed older precedents[3] and allowed a gift in favour of an unincorporate group of persons.[4] It repeatedly said that it would look favourably upon such trusts, and interpret the documents creating such a trust in the manner most beneficial to it.[5] If there was any difficulty about carrying out the trust it would itself make a scheme for the purpose.[6] We may perhaps see here the influence of the canonist leaning in favour of promises made for charitable purposes;[7] and no doubt that influence was strengthened by the Elizabethan legislation in favour of these trusts.[8]

The only difficulty arising with regard to the creation of an express private trust is to prove that it has been created. Equity exacted strict proof of this,[9] unless the facts were admitted;[10] and it would appear that, at this period, it was not so ready, as at a later period, to allow that merely precatory words proved the existence of such a trust.[11] Of an implied trust we get an illustration in the rule laid down in 1608-1609 that in equity executors did not necessarily take the undisposed-of residue beneficially, and that a trust might be implied in favour of the next of kin and charity.[12] Of constructive trusts we get many illustrations. The principle upon which they rested was already well known in the law relating to uses of freehold.[13] One illustration from the year 1579 will suffice.[14] "The bill setteth forth, that Gibone, one of the defendants, in consideration of £286 did bargain and sell unto the plaintant certain lands in the bill mentioned; and made unto him a deed of feoffment, and a

[1] Vol. vi 643.

[2] Though by this time cases of trusts went to the court of Chancery, it may be noted that the Council sometimes interfered in cases of public charitable trusts, see e.g. Dasent x 197, 368 (1578)—a case in which Queen's and Lincoln College, Oxford, were concerned.

[3] Vol. iv 439-440.

[4] "Mayor de Reading *contra* Lane, gift to poor, because no corporation, void; yet relieved in 42 Eliz. li. A. fo. 706" (1599-1600), Tothill 7.

[5] See Emmanuel Coll., Cambridge v. Evans (1625-1626), 1 Ch. Rep. at p. 21; "In cases of charitable uses, the charity is not to be set aside for want of every circumstance appointed by the donor; if it should, a great many charities would fail," Joyce v. Osborne (1636-1637), Nelson at p. 41.

[6] Maggeridge v. Grey (1641-1642), Nelson 42-43; cp. Mayor of Reading v. Lane (1600-1601), Tothill 32; Steward v. Jermyn (1578-1579), ibid 30.

[7] Doctor and Student, Bk. ii c. 24, cited above 295. [8] Vol. iv 398-399.

[9] Mynn v. Cobb (1604), Cary 25, above 276 n. 3; Lake v. Phillips and Lake (1636-1637), 1 Ch. Rep. 110.

[10] Spring v. Upton (1579), Cary 81.

[11] (1603) Cary 22-23; vol. vi c. 8.

[12] Brereton v. Roberts (1608-1609), Tothill 87. [13] Vol. iv 424.

[14] Ireby v. Gibone, Cary 82-83; cp. Rooke v. Staples (1579), ibid 76; Cosin v. Young, Nelson 33-34.

letter of attorney, to make livery and seizin; and before livery, made a lease to Cateline, who knew of the bargain, and he leased to Brown, who knew also of the bargain, and this appearing to this court to be true, an injunction is granted to the plaintant, until the cause should be heard and determined." As we can see from this case and others, the crucial point in these cases was the presence or absence of notice; and it would seem the court had already begun to consider the question of constructive notice. From a mere rumour notice would not be implied;[1] but from the existence of a suit it would.[2] It was a doubtful point whether a purchaser without notice from one with notice was bound.[3]

(2) The object of the trust must be legal. In 1601 the court refused to redress a breach of trust where the trust had been made to defraud creditors.[4] Similarly the court declined to aid trusts which would defraud the king of his rights or would create perpetuities. In 1599[5] "Lord Egerton pronounced openly that he would give none aid in Chancery for the maintenance of any perpetuities, nor of any lease for hundreds or thousands of years, made of lands holden in capite; because the latter be grounded upon fraud, and the former be fights against God." Several cases show that the court acted upon these principles.[6]

(3) The duties of the trustees were to hold themselves ready to deal with the property in accordance with the terms of the trust. The court would order the necessary conveyances to be made.[7] They must invest money with due care; but the court did not as yet set an excessively high standard of prudence. "If the trustee let it (money) out to supposed able men (though they fail) (the court) will not charge the trustee for no more than he received."[8]

(4) With regard to the trustee's liabilities, it was settled that he could not plead the statute of limitation.[9] As to the liability of co-trustees it was held that one was not liable for the mis-

[1] "A conveyance absolute in words, and yet there is a bruit of trust, but doubtful whether there be a trust or not, and on hearing the bruit bought the land, yet shall not be concluded by such a bruit, as Sir Thomas Egerton said, Cornwallis's case 1595," Tothill 186.

[2] "A suit is depending for a trust, and after upon hearing the trust is proved, then that is a sufficient notice of trust to any man which buyeth it, hanging the suit," Diggs v. Boys (1598), Tothill 186.

[3] Pitts v. Edelph (1631-1632), Tothill 186.

[4] Woodford v. Multon overruling Greene and Cotterell's Case, Cary 13.

[5] Cary 8.

[6] Bishop of Hereford v. Bright (1630), Tothill 43—a conveyance made to avoid wardship ordered not to be given in evidence; cp. Coke's statement in Lampet's Case (1612), 10 Co. Rep. at f. 52a; Risden v. Tuffin (1597), Tothill 122, "no relief in equity touching leases of one thousand years because they tend to defraud the crown;" ibid 146, cases as to perpetuities.

[7] Young v. Leigh (1577-1578), Cary 67.

[8] Carew v. Peniston (1637-1638), Tothill 136. [9] Tothill 75, 89.



feasances of the other unless he took part in them,[1] or unless by his negligence he made them possible.[2]

(5) We have seen that during almost the whole of this period the court did not attempt to evade the Statute of Uses by upholding a use upon a use.[3] To do so would, as I have said, have been clearly detrimental to the royal rights to the incidents of tenure;[4] and we have seen that Egerton frowned upon leases for long terms of years upon this ground.[5] But there are some indications that both the common lawyers and the chancellor agreed that relief might be given to the second cestuique use in the case of a charitable trust,[6] or if a clear case of fraud could be proved. Bacon seems to hint at these possibilities in his argument in *Chudleigh's Case*[7] which was delivered in 1594; and an anonymous case reported by Cary illustrates its application: "If A sells land to B for twenty pounds, with confidence that it shall be to the use of A, yet A shall have no remedy here, because the bargain hath a consideration in itself; and such a consideration in an indenture of bargain and sale seemeth not to be examinable, *except fraud be objected*, because it is an estoppel."[8] In the precedents contained in the 1615 edition of West's Symboleography an attempt is made to impose a trust upon the bargainees in a bargain and sale;[9] and in *Sir Moyle Finch's Case*,[10] in 1600, it seems to have been admitted that, though the trust at issue in that case was not enforceable, a trust, though it was the trust of a use, if it was clearly proved, might be enforced in equity. As this case affords a good illustration of the views held both by the common lawyers and by the chancellor at this period upon this matter, it is necessary to examine its somewhat complicated facts.

Queen Elizabeth granted by letters patent to Sir Moyle Finch and John Awdelye and their heirs, certain lands, on trust to convey some of them to Sir Thomas Heneage and Anne his wife and the heirs of Anne, and to convey others to Sir Thomas Heneage and Anne his wife and the heirs of Sir Thomas. The lands were conveyed accordingly by bargain and sale. Sir Thomas had an only child Elizabeth. Anne died; and Sir

[1] Townley v. Shurborne (1633), Tothill 88.

[2] Capell v. Gostow (1614-1615), ibid.

[3] Vol. iv 472-473. [4] Ibid. [5] Above 306.

[6] "Although in the *habendum* a trust is declared, that without question cannot make the bargain and sale void, but the conveyance, being by bargain and sale, was wisely made to declare the confidence and trust," Case of Sutton's Hospital (1613), 10 Co. Rep. at f. 34a.

[7] "The said feoffees in special cases which pretend favour may be enjoined out of Chancery, where uses always have been ordered, that they shall not do any act to the prejudice of the use which may thereafter arise, and the subpœna in this case be revived," Works (Ed. Spedding) vii 636.

[8] Cary 14. [9] § 284. [10] Coke, Fourth Inst. 85-86.

Thomas (though disseised of the land) by bargain and sale enrolled conveyed the land settled on himself and his heirs to the plaintiff, on trust for the payment of his debts. He died; and the plaintiff filed his bill against Sir Moyle Finch and his wife for the land. The chancellor made a decree for the plaintiff. The defendants then petitioned the queen for a reversal of the decree.[1] She referred the case to the judges, and on their report the decree was reversed.

It will be observed that there were two trusts in this case—firstly the trust to convey to Sir Thomas Heneage and Anne his wife and their heirs, and secondly the trust raised on the bargain and sale by Sir Thomas for the payment of his debts.

As to the first trust, it was, as Ames has said,[2] an active trust. It was clearly not considered to be a trust to which the Statute of Uses applied, as the trustees thought it necessary to convey to Sir Thomas and his wife by bargain and sale. But it should be noted that the active duty in this case was simply to convey. It is clear that the distinction between an active trust simply to convey to X, and a conveyance to the use of X, is a little thin; and the thinness of the distinction tended to become more apparent, because, as we have seen,[3] the original reason for the rule that there could be no use upon a use was tending to be lost sight of. That being so, it would be only natural that in a case of fraud or great hardship—if, e.g., all the parties had acted in reliance on the carrying out of the trust—the chancellor should reconsider the rule that the second use could not be enforced.[4] And it would seem from what the judges said in this case that they would not have disagreed. They said:[5] "If a man make a conveyance, and express an use, the party himself or his heirs shall not be received to aver a secret trust, other than the express limitation of the use, *unless such trust or confidence do appear in writing, or otherwise declared by some apparent matter.* And Popham said that covin accident and breach of confidence were within the proper jurisdiction of this court"—i.e. the court of Chancery.

The second trust—that created by Sir Thomas Heneage in favour of his creditors on the bargain and sale—was not upheld on appeal. But it should be noted that the grounds upon which the chancellor's decision was reversed have nothing to do with

[1] This was at that period the only way in which a decision of the chancellor in the exercise of his equitable jurisdiction could be questioned vol. i. 372-373.
[2] Lectures on Legal History 245-246. [3] Vol. iv 471-472.
[4] "The spectacle of one retaining for himself a legal title, which he had received on the faith that he would hold it for the benefit of another, was so shocking to the sense of natural justice that the chancellor at length compelled the faithless legal owner to perform his agreement," Ames, Lectures on Legal History 247.
[5] Fourth Instit. 86.



the rule that there can be no use upon a use. The trust was declared invalid on four grounds:[1] firstly, because Sir Thomas, being disseised, could make no valid conveyance of the legal estate; secondly, because, though Sir Moyle Finch was (it would seem) the disseisor, he was not bound by the trust because he was *in* in the post;[2] thirdly, because the bare trust, which was all that was left to Sir Thomas, was incapable of assignment, and so could not be enforced by the plaintiff; and fourthly, because the title and the trust had descended to the daughter, so that the trust was merged in the legal estate.

It would seem that, according to the later rules of equity, the second and third grounds for this decision were bad. But, whether the decision was right or wrong according to the then received principles of equity, it is clear that the reasons on which it was based had nothing to do with the doctrine of the invalidity of a use upon a use. On the contrary, it is, as we have seen, clear that the judges admitted that there might be cases in which equity might properly uphold a second use. This view, which thus had the support both of the chancellor and of the common lawyers, was acted upon in 1633-1634 in the case of *Sambach* v. *Dalston*.[3] Thus it is clear that the rule that there could be no use upon a use was weakening. But, as we have seen, it was hardly likely that it would be wholly abandoned so long as the king's financial interest in the incidents of tenure made its continuance necessary in order to prevent the evasion of these burdens.[4] This was really the only cause for the maintenance of the rule; and so we shall see that, in the following period, when, in consequence of the abolition of the military tenures, the king had no further interest in perpetuating it, it silently disappeared.[5]

*Family Law.*

The two branches of family law in which important developments were made by the court of Chancery during this period were, firstly, the law as to married women, and, secondly, the law as to the guardianship of infants. It is in the first of these branches of the law that the most important developments took place. Although the court was ready to intervene in the second, its activities were fettered by the continued existence, during the

[1] Fourth Instit. 85; I have paraphrased these grounds, and omitted that which turned on the views of the judges as to the limits of the equitable jurisdiction to examine the title to freehold.
[2] It is not stated that Sir Moyle Finch was the disseisor; but it seems to me that it is necessary to suppose this to make sense of the report; he must have been in seisin or the bill would not have been brought against him, so that he was either the disseisor or acquired the seisin from him.
[3] "Because one use cannot be raised out of another, yet ordered and the defendant ordered to pass according to the intent," Tothill 188.
[4] Vol. iv 472. [5] Vol. vi 641-642.

whole of this period, of the feudal rights of wardship, which were controlled by the court of Wards and Liveries.

(1) I have already described the status of the married women at common law;[1] and we have seen that that status was not materially modified by the ecclesiastical chancellors.[2] But during the sixteenth and early seventeenth centuries we can see the gradual growth of a feeling that these rigid rules ought to be modified. The total incapacity of the married woman to own personal property, and to deal with her real property, naturally appeared more and more unsatisfactory to the women of the wealthier classes and their relations—in 1590 George, earl of Shrewsbury, made a legacy to his daughter conditional on her surviving her husband.[3] Hence we find attempts to modify her proprietary incapacity; and the partial success of these attempts naturally introduced modifications of her other disabilities which had followed from this proprietary incapacity.

The methods adopted to modify her proprietary incapacity seem to have been two in number. Firstly, an attempt was made to use the machinery of a contract or contracts entered into before marriage; and secondly, use was made of the machinery of the trust. Sometimes there was a combination of these two devices.[4]

(i) There are, during this period, one or two cases in which effect was given to a contract entered into before marriage to allow a married woman a limited power of disposition; and contracts of this kind appear in the conveyancing precedents of this period.[5] In the case of *Avenant* v. *Kitchin*[6] (1581-1582) the report runs as follows:—"The bill is as well for certain legacies given them [the plaintiffs] by the late wife of the said Kitchin, and also to have the said Huet ordered not to release a Recognizance of 2000 marks, wherein the said Kitchin is bound unto him in trust before marriage with his said wife, that she might by the will dispose of £500 of goods besides her jewels. Kitchin demurred upon the bill, and sued the said Huet in the court of Requests to release the said Recognizance; and ordered, if cause be not showed by such a day, then a subpœna to Kitchin to make a better answer, and to Huet not to release the Recog-

[1] Vol. iii 520-533. [2] Vol. iv 428-429.

[3] "Unto my daughter Grace, now wyfe of Henrie Cavendishe, esquier, one thowsand poundes, to be payde within one quarter of a yeare after the death of her husband, yf she fortune to survive him, or else she to not take anie proffytt of the legacie," North Country Wills (Surt. Soc.) ii 148-149.

[4] See Castillian v. Castillian (1612), Monro, op. cit. 164-166—the husband entered into a recognizance with the wife's friends to make a jointure of £400 a year, and conveyed to them in trust a manor and all her jointure from former husbands, and by deed of gift gave them all his goods to her use.

[5] Vol. vii 379. [6] Choyce Cases 154.



nizance." It appears therefore that the court was inclined to uphold the validity of such an agreement; and in 1637-1638, in the case of *Palmer* v. *Keynall*[1] a similar agreement was in fact upheld. But the Chancery decisions are not uniform. Many of them seem to go no further than the common law decisions of this period.

The question of the validity of an ante-nuptial agreement by a husband to leave his wife property by his will had already come before the courts of common law. They had held that, though an agreement between a man and a woman was avoided by their intermarriage,[2] yet it might be upheld if the obligation only arose after the determination of the marriage. Thus an agreement by a man to bequeath to a woman £100 if she married him, would be enforceable by her if she married him and survived.[3] Of course these decisions do not go the length of the Chancery decisions, which allowed a married woman to acquire by contract an active disposing power over property, even during the marriage. They only allow that the wife might acquire by contract a capacity to receive on the termination of the marriage. But they do evidence a disposition to relax slightly the strictness of the technical rules of the common law.

In conformity with this view it was held in the Chancery that there could be no contract between husband and wife,[4] that neither could sue the other,[5] and that after marriage no variation of any settlement made before marriage could be effected by agreement.[6] Similarly it was doubted in some cases whether a contract made before marriage could give the wife any active disposing power during the marriage. In 1631 the lord keeper and two of the judges declined to uphold a verbal agreement, made before marriage, that a wife should have the sole disposal of £600 a year due to her under a decree of the court.[7] They said that "the verbal agreement in consideration of the said marriage was to subvert both the grounds of law, and the right

[1] Ch. Rep. 118.

[2] Y.BB. 11 Hy. VII. Mich. pl. 15; 21 Hy. VII. Mich. pl. 4.

[3] Smith v. Stafford (1618), Hob. 216, *diss.* Hobart; Clark v. Thomson (1620), Cro. Jac. 571; Lupert v. Hoblin (1657), 2 Sid. 58.

[4] Stoit v. Ayloff (1632-1633), 1 Ch. Rep. 60.

[5] Simpson v. Simpson (1627-1628), Tothill 97.

[6] "A man having three daughters, entails his land upon them; after, one of them was married, and being a *feme covert*, with the consent of her husband, was contented and agreed to take one thousand pounds, in consideration and extinguishment of her right as coheir; the judges hold it to be no good bar to her," Dockwray v. Poole (1609) Tothill 98.

[7] Lord Suffolk v. Greenvil (1631), Nels. 15; cp. Povy v. Peart (1590), Tothill 98; Atwood v. Stubbs, ibid 98-99; Flecton v. Dennys (1594), Monro, Acta Cancellaria 655-659, below 313-314: these were cases of trusts, but the principles applicable seem to be somewhat similar.

which was vested in him (the husband) by the intermarriage; and therefore if such agreement is not settled by some legal assurance to make it binding in law, it is not fit to be maintained in a court of equity, in order to give a feme covert such a power as is now pretended." In fact the court sometimes seems to have regarded devices used by the wife to withdraw her property from her husband's control, as frauds upon the husband's legal rights, unless the husband had received consideration for the abandonment of his rights. This feeling also affected attempts to improve the married woman's proprietary position through the machinery of the trust; but, as we shall now see, the comparative flexibility of that machinery made it possible, if under the circumstances it seemed to be equitable, to modify the married woman's proprietary position by arrangements made both before and during the marriage.

(ii) There are several illustrations, both in the reports and in the conveyancing precedents, of the growing practice of conveying property to friends of the wife for her use; and it is quite clear that the court of Chancery was prepared to give effect to them.[1] At this period the common law judges justified this device on the ground that, if the estate so settled was equitable, it was a mere chose in action, and not property at all from their point of view.[2] The court of Chancery was no doubt influenced in favour of these arrangements by the fact that many of them were part and parcel of a bargain as to the wife's jointure. The Statute of Uses had made a legal jointure in lieu of dower legally possible;[3] and equity had soon improved upon this by upholding bargains for a jointure other than those contemplated by the statute.[4] The need for such an extension was the more apparent since equity was inclining to refuse to permit dower out of equitable estates.[5] A fair arrangement so made would no doubt be upheld by the court. But it would seem that the mere fact that a trust had been created for the benefit of the woman would not necessarily bar the husband, unless it could be shown,

[1] "Waterhouse, defendant, was grantee of a lease in trust to the use of the wife of Witham; she died, and made Waterhouse administrator; Witham complained, and would have had the lease in equity, the order and opinion of the court was, he should not, but the grantee and administrator should" (1595-1596), Tothill 91, S.C. Co. Fourth Instit. 87; FitzJames v. Hirsley (1590), Tothill 43; cp. Fleshward v. Jackson (1623-1624), ibid 94; for the conveyancing precedents see vol. vii 376-380.

[2] Co. Fourth Instit. 87—"This trust was a thing in privity, and in nature of an action, for which no remedy was but by writ of Subpœna;" this reasoning was overruled by the House of Lords in Sir Edward Turner's Case (1681), 1 Vern. 7, and it was decided that the husband could dispose of his wife's equitable estate unless settled on her with his consent; below 314-315.

[3] Vol. iii 196.

[4] Lacy v. Anderson (1581), Choyce Cases 155-156—copyholds settled and a demurrer that copyhold is no legal bar overruled.

[5] Kempe v. Lord Reresby (1626), Tothill 99; vol. iii 196.



either that in the circumstances it was fair and reasonable[1]—the facts for instance that the husband was a wastrel,[2] or that the wife was separated from him,[3] would be facts that would induce the court to protect the married woman; or that it was made with the consent of the husband, and not secretly so as to defraud him of his marital rights. This point of view is very clearly illustrated by the decree in the case of *Flecton* v. *Dennys* in 1594.[4] It appears that Walter Dennys had sold to the plaintiff the lease of a parsonage impropriate which belonged to his wife. But his wife, who had acquired the lease as the executrix of her late husband, had, long before her second marriage, conveyed the lease to trustees. She had done this partly to provide for "the preferment of her kindred and servants in performance of her former husband's will," and partly in order that, if she married again, "her second husband should have no power to make away or incumber the said lease." Walter Dennys tried to prove that this conveyance had been made after the contract to marry, and was therefore in fraud of his marital rights. But it was proved, that so far was this from being the case, that Dennys had known of it and approved it before the marriage had taken place, and had impliedly ratified it after the marriage. The court therefore upheld the assignment. And, as it appeared that Dennys had had a good deal of property with his wife, the court in substance ordered that the trustees should hold the lease for the wife and that she should have the sole power of disposing of it.[5] Further, it ordered that, as "it is alleged that the said Mrs. Dennys hath been hardly forced to sell away her jointure, and to discharge the bonds and assurance for the same, and that she wanteth competent maintenance for a gentlewoman of her estate, this Court thinks it convenient, if that be true, that she should have out of the leases which were hers, and are assigned as aforesaid, some

[1] See Povy v. Peart (1590), Tothill 98.

[2] Fleshward v. Jackson (1623-1624), Tothill 94.

[3] Georges v. Chancie (1639), Tothill 97; the Ecclesiastical courts sometimes assumed jurisdiction in such cases, and were occasionally assisted by the Council, Dasent ix 39, 96, 107, 144, 148 (1575-1576).

[4] Monro, op. cit. 656-659.

[5] "It is therefore thought meet and so ordered by this Court, that the said grantee, or any of them, shall not, without the special licence and order of this Court thereunto first had, make any grant, assignment, charge, or incumbrance of the said lease, to any person or persons, whereby the profit or commodity, which the said Mr. Dennys and his wife, or either of them, may or ought by the said trust to have or take during her life of the things demised by the said lease, may be taken away or impaired, so that in the opinion of this Court she (and so consequently her husband) is by the said trust to have the use and commodity thereof during her life: but the disposition of so much of the said term, which shall be to come after his death, resteth now in her power during her life, though she be covert, and the said assignees or grantees ought by the said trust to convey and assure the same, according to her appointment and disposition," at p. 658.

meet and convenient portion for her maintenance, answerable to the calling of Mr. Dennys, and unto her estimation and countenance, which she had before she was his wife."[1] We see here in germ the ideas which later will give rise to the doctrine of the wife's equity to a settlement; so that it is not surprising to find that in 1638-1639 this equity was practically recognized.[2] But, when this result has been reached, it will not be long before the court will cease to look at the reasons for a settlement on a wife for her separate use, and will begin to recognize that in all cases where such a settlement is made the wife has complete proprietary capacity in respect of the property settled.

This result had not been completely reached at this period; but it is quite clear that by means of a trust of this kind, a proprietary capacity could, in a suitable case, be conferred on a married woman; and that she could even receive a present from her husband.[3] It followed that a married woman was capable of performing legal acts in relation to this property, and that she was capable of acting as an independent party in legal proceedings in the court of Chancery. Thus, although in some cases the old idea that she could not, while under coverture, dispose of her property still lingered on,[4] in other cases her dispositions seem to have been upheld. She was allowed to make a will of her separate property,[5] to make a present of it to her husband,[6] and

[1] Cp. Castillian v. Castillian (1612), Monro, op. cit. 164-166, where the circumstances and the conduct of the parties are carefully considered. These rules of law are alluded to in Butler's Hudibras Pt. III. canto i ll. 1187-1194:—

> "How would'st th' have us'd her and her money?
> First turned her up to alimony,
> And laid her dowry out in law
> To null her jointure with a flaw,
> Which I beforehand had agreed
> T' have put on purpose in the deed,
> And bar her widow's making over
> T' friend in trust, or private lover."

[2] "The defendant sues in the Ecclesiastical Court for a portion due to his wife, this Court orders an injunction to stay proceedings there, till he shall make a competent jointure," Tanfield v. Davenport (1638-1639), Tothill 114-115; but that the equitable rule was as yet uncertain can be seen from the fact that in 1637 an aggrieved wife makes her application to the ecclesiastical court, S.P. Dom. 1637-1638 32, ccclxxiv 31; and in 1638 to the king, ibid 575-576, cccxcv 86.

[3] Hawkyns v. Peterson (1605), Monro, op. cit. 49-51.

[4] "A widow, before marriage, makes a conveyance to the use of herself to friends, because her husband shall not have benefit; the trustees assign this lease to one for valuable consideration, and though the husband joins, shall not prejudice her; but because the assignee came in upon a valuable consideration, shall keep it till he receive all disbursements, and the wife to have benefit of the same," FitzJames v. Hirsley (1590), Tothill 43; "money by consent of her husband, put forth for the use of the wife, and gives power, she will dispose thereof accordingly, but not allowed," Poole v. Harrinton (1638-1639), Tothill 136; and cp. S.C. ibid 97; cp. Hawkyns v. Peterson (1605), Monro, op. cit. 49-51.

[5] Flecton v. Dennys (1594), above 313 n. 5.

[6] Baskervile v. Sinthorne (1614-1615), Tothill 95.



to sell land so settled to strangers;[1] and perhaps even to make a binding contract.[2] Similarly she could appear as plaintiff or defendant in litigation in the court of Chancery.[3] Occasionally, indeed, the fact that her husband is beyond the seas or that she is living apart from him is given as a reason for allowing her to do so;[4] but in other cases no such reason is given, and it is fairly obvious that her capacity thus to sue or be sued is the consequence of the new proprietary position given her by equity.

(2) As I have said, the court of Chancery did not get very much chance of interfering in questions of guardianship during this period.[5] But we can see that, where there was property to protect, and where the case fell outside the purview of the court of Wards and Liveries, it was prepared to assume jurisdiction. Thus it was prepared to adjudicate upon the title of a child's relative to be guardian in socage;[6] and it assumed jurisdiction to compel the executors of such a guardian to account for rents and profits taken during the minority.[7] Further, it could order allowances to be given to children for their education during their minority.[8] It is clear that when feudal wardship disappears the court will be quite ready and able to assume the rôle of the protector of the proprietary interests of infants; and that the way will be opened for the assertion of even more extensive claims based upon a supposed delegation of the king in his capacity of *parens patriæ*.[9]

*The Administrative Jurisdiction.*

The machinery of the court of Chancery was, as we have seen,[10] as well adapted for the exercise of this jurisdiction as the machinery of the common law courts was badly adapted. It could examine accounts; and it could supervise and adjudicate upon the conduct of those who administered an estate as trustees, guardians, or executors. For the same reason it could adjust accounts between principal and surety, or surety and surety,

[1] Bannister v. Brooke (1619), Tothill 158.

[2] "The defendant demurred, because she promised to pay money when she was covert baron, overruled," Hamblin v. Sherringham (1582-1583), Tothill 74.

[3] See Tothill 74, 93, 94, 95.

[4] Castleton v. Fitzwilliams (1579-1580), Cary 100, 101; Plomer v. Plomer (1633-1634) 1 Ch. Rep. 68.

[5] Above 309-310.

[6] Sweetman v. Edge (1577-1578), Cary 96-97.

[7] Burgh v. Wentworth (1576), Cary 54.

[8] "Children allowed seven or eight pounds *per centum* for their education, where there is no allowance by the will," Bright v. Chappell (1629-1630), Tothill 6; "executors ordered to put in good security to allow five pounds *per centum* for education, and to make good their portions," Barwick v. Barwick (1601-1602), ibid 52; "the defendant's wife being *priviment enseint* at her husband's death, the child could not be provided for by law, but the court ordered that the child should have sufficient allowance," Pope v. Moore, ibid 93.

[9] Vol. vi 648.

[10] Above 288.

between principal and agent, and between partners. Of trusts I have already spoken, and shall speak again later;[1] and of the beginnings of the modern law of partnership and of principal and agent I shall speak in the Second Part of this Book.[2] Of the subjects upon which the court is already beginning to acquire a certain number of rules are, (1) certain topics connected with the administration of the assets of deceased persons; and (2) one or two rules as to the contract of suretyship. At this point, therefore, I shall say something of these two subjects.

(1) We have seen that jurisdiction over wills, intestacies, and the administration of assets was divided between the common law courts and the ecclesiastical courts—with very inconvenient results.[3] The machinery of the common law courts was quite incapable of being used for administrative work; and, during this period, the growing weakness of the ecclesiastical courts made them increasingly incapable of remedying the deficiencies of the common law courts.[4] Hence there was an increasing need for the court of Chancery to continue to intervene to remedy the defects of both sets of tribunals.[5] The result of its interposition was to create our modern law as to the administration of assets. But as yet we are far from this result. We can only see the beginnings of some of our later rules in various encroachments on the sphere of (i) common law rules, and (ii) the rules laid down by the ecclesiastical courts.

(i) The common law rules dealt mainly with the devise,[6] the position of the heir or devisee,[7] and the relation of the executor or administrator to the debtors or the creditors of the estate.[8] In many cases equity was content to follow the law. It left most questions concerning devises to the common law courts.[9] It followed the law as to the executor's personal liability for devastavit[10] and other wrongs[11] committed by him, as to his non-liability for the torts of the deceased,[12] as to the independent powers of co-executors,[13] and as to the necessity of the executor's

[1] Vol. vi 641-644. [2] Vol. viii 194-199, 222-229, 242-243.
[3] Vol. iii 534-535, 585-595.
[4] Ibid 594; for this reason the Council often intervened, see e.g. Dasent x 123 (1580), 351 (1580-1581); xxiii 286-287, 357 (1592); in a case of 1576-1577, ibid ix 272-274, we see the Prerogative court, the Exchequer, and the Chancery all engaged in settling questions as to the administration of a single estate.
[5] Above 288-289. [6] Vol. iv 465-467; Pt. II. c. 1 § 4.
[7] Vol. iii 574-576. [8] Ibid 576-583, 584-591.
[9] Vol. vii 142-143. [10] Cary 24.
[11] Watts v. Kancie (1612), Tothill 77—an executrix who sold, free from incumbrances, a lease subject to a charge in favour of a devisee, was held to be personally liable for the amount of the charge; cp. Townley v. Shurborne (1633), ibid 88—liability for waste.
[12] Holland v. Owen (1627-1629), Tothill 87—"an executor shall not be charged with a trespass committed by the testator."
[13] Bacon v. Bell (1597), Tothill 87—"two executors, the one dissents, yet the act of the other shall be good."



assent to complete the title of the legatee.[1] But in a much larger number of cases it was obliged to correct the injustice of common law rules, and to supplement their deficiencies. By so doing it helped to define the duties of the personal representatives, it gave them a certain measure of protection, and it began to lay down certain rules for the administration of the estate.

In the first place, the court of Chancery helped to define the duties of the personal representative. It did not regard him as a trustee unless specially appointed to that office;[2] but it subjected him to some of the same rules as those which it applied to trustees. Thus he must, as in the ecclesiastical courts, account for all benefits received;[3] and, like a trustee, he could not plead the statute of limitation.[4] Though entitled by law to the undisposed of residue, in equity that residue must be "disposed of to the testator's kinsfolk and to charitable uses."[5] Moreover, although the appointment by a testator of his debtor as his executor extinguished the debt at law,[6] it did not necessarily have this effect in equity.[7] In the second place, the court provided some protection against the harsh rules of the common law. It gave co-executors some protection against each other's acts. Thus, in equity one executor could sue the other;[8] one executor could prevent another from improperly releasing a debt due to the estate;[9] one executor could compel the other to give security for the carrying out of a trust imposed upon them;[10] and if one of two co-executors, in compliance with a decree, paid debts and legacies, he could compel his fellow to pay a moiety.[11] It also gave them some protection for acts done or proposed to be done

[1] Carter v. Cupper (1583-1584), Choyce Cases 173; vol. iii 583.
[2] Anon. (1602), Cary 21—"*Nota que executor non poit estre* a trust, unless he have an especial gift in the will, and that may then be in trust, otherwise the general trust of an executor is to pay debts and legacies; and of the surplus-age to account to the ordinary in *pios usus*."
[3] Beecher v. Haselwood (1579-1580), Choyce Cases 143—"the defendants demurred for that they are executors, and therefore not chargeable in law to accompt for goods received by the testator: but ordered to answer"; cp. vol. iii 592.
[4] Anon. (1639-1640), Tothill 89.
[5] Brereton v. Roberts (1608-1609), Tothill 87. [6] Vol. iii 589.
[7] Askwith v. Chamberlaine (1640), Tothill 53; S.C. Nels. 44.
[8] Allen v. Story (1585), Okely v. Barnard (1596-1597), Tothill 86; in Mohun v. Blunt (1621), Monro, op. cit. 300-301, it was said—"the executor complained of ought to answer the same; for that, however, in the eyes of the law, many of them represent but one person; yet every of them hath a several conscience to be rectified and reformed by this court."
[9] Anon. (1488-1489), Cary 15, citing Y.B. 4 Hy. VII. Hil. pl. 8 (p. 5)—in that case the chancellor said—"Sir jeo scay bien que chescun *Ley* est, ou de droit doit estre, accordant a *Ley* de Dieu; et le *Ley* de Dieu est, que un executor qui est de male disposition ne expenderait touts les biens, etc. Et jeo scay bien si issint soit, et ne fait amends, ou ratification (sc.) si il soit de pouvoir, ou n'est voulant a faire restitution si il soit de pouvoir, il sera damne in *Hell*, etc. Et a faire remedy pur tiel chose, come jeo entend, est bien fait accord al conscience etc."
[10] Cotton v. Causton (1579), Cary 79.
[11] Rowe v. Billing (1634-1635), Tothill 89.

in an apparently due course of administration. Thus payment of debts or legacies under a decree of the court was a full protection against any proceedings to question its regularity.[1] In the third place, the court could look at the position of the estate, and the relations of those against whom it had claims and of those who had claims against it, and lay down rules for its proper administration.

In thus acting it accomplished what the common law courts were wholly unable to accomplish; and it more than filled the place left vacant by the decline of the ecclesiastical courts.[2] As yet, however, the cases are scanty, and few general rules can be laid down. It was quite clear that debts must be paid before legacies;[3] and, as a rule, specialty debts before simple contract debts. In one case, however, the court seems by special order to have given a simple contract debt priority.[4] Personalty (and, in the absence of contrary intention, chattels real were included in personalty)[5] was primarily liable to the payment of debts.[6] But realty could be charged with the payment of debts, and in such a case the heir must where necessary join in a sale.[7] An estate pur autre vie, created as a security for a debt, was held to be assets for payment of the mortgagee's debts;[8] and an heir was held to be liable for the performance of his ancestors' covenants, even though he had taken the land by devise.[9] But

[1] Terrey v. Fowler, Tothill 88-89; Byard v. Byard (1578-1579), Choyce Cases 123-124.

[2] That the defects of the common law jurisdiction, which were apparent in the Middle Ages (vol. iii 556-557, 591, 594) were still apparent in the middle of the seventeenth century is clear from Shepherd, England's Balme (1657); he says, at p. 105—"It is a very hard thing to get money of an executor or administrator by a suit, he hath so many ways to avoid it; nor can an executor that is willing to pay as far as the estate will go, tell how to do it with safety;" and at p. 107 he suggests the remedy which the extension of the equitable jurisdiction eventually gave—"It is offered for the cure of all this at once, to consider, if such a way as this may not be devised: that the executor or administrator in all cases, or any creditor when no executor is appointed, . . . may have a commission out of Chancery, after the manner of the commission of bankrupts to certain special commissioners, to call all the parties interested, and make an equal distribution; and those that come not to lose their debts; and see that the overplus remain according to the will, or to the wife and children, according to equity;" in later times the decree for the administration of the estate set going a machinery which substantially effected these subjects in a manner somewhat similar to that proposed.

[3] Wray v. Sapcote (1579), Cary 86-87.

[4] Cole v. Ferrand (1605-1606), Tothill 53—"the plaintiff was satisfied of a debt upon word by order of Court before others upon speciality."

[5] Golding v. Tuffin (1612), Tothill 124—"A lease for many years, although it be intailed to many in remainder, decreed to be sold for payment of debts;" cp. Powell v. Moulton (1627), ibid—"a lease intailed not subject to debts . . . because intended, and the defendant to pay debts out of the personal estate."

[6] See Smith v. Hopton (1642-1643), 1 Ch. Rep. 155-157.

[7] Amby v. Gower (1655), 1 Ch. Rep. 168-169; cp. Stanley v. Bracewell (1578-1579), Choyce Cases 119, 120.

[8] Tuphorne v. Gilbie (1629-1630), 1 Ch. Rep. 39, 40.

[9] Pool v. Pool (1625-1626), 1 Ch. Rep. 18.



he was held not to be liable to convey land contracted to be sold by the deceased, though payment had been made to the deceased.[1] Legacies must, as a rule, be paid rateably out of personal estate, and if the personal estate was insufficient, out of any real estate charged with their payment.[2]

(ii) The rules laid down by the ecclesiastical courts were concerned mainly with legacies and wills of personalty, and, to some extent, with the conduct of the executor or administrator.

In some cases equity followed the rules laid down by the ecclesiastical courts, just as it followed the rules laid down by the common law courts. Thus, the mere fact that the time for the payment of one of the legacies was postponed, would not justify the executor in paying those immediately payable, and leaving no funds to pay the postponed legacy;[3] and, as a rule, it did not compel an executor to give security for the due performance of his duties, though it had power to do so.[4] But, as the jurisdiction of the court of Chancery encroached upon that of the ecclesiastical courts, so it gradually evolved new rules of its own.

At first the court seems to have been reluctant to interfere with the jurisdiction of the ecclesiastical courts over legacies.[5] But towards the latter part of this period this reluctance disappeared. Any excuse was taken to assume jurisdiction;[6] and even the fact that an action had first been brought in the Chancery was sufficient.[7] Hence we find the court considering the abatement of legacies,[8] the position of a legatee to whom the

[1] Weston v. Danvers (1584), Tothill 105—"the heir is not in equity bound to assure lands, which his father bargained and took money for."

[2] Vintner v. Pix (1639-1640), 1 Ch. Rep. 133-134; cp. Newell v. Ward (1636-1637), Nels. 38-40.

[3] In the case of Vinter v. Pix (1639-1640), 1 Ch. Rep. at p. 133 the court referred the question to the judges of the Prerogative court.

[4] Browne v. Purton (1589-1590), Tothill 86—"Executors not in equity compelled to put in bond to perform the will or answer legacies, unless it appear they have either broken the trust in them reposed by the testator, or be decayed since his death, for at his death it seemed he trusted them without bond"; cp. ibid 52 for cases where security was ordered; Wickham v. Dighton (1608), Monro, Acta Cancellaria 94.

[5] Nelson v. Norton (1591), Monro, Acta Cancellaria 10-11; in Smith v. Doughtie (1609), ibid 117-118, Lord Ellesmere dismissed a suit for legacies to the ecclesiastical court.

[6] See Cliffe v. Cliffe (1575), and Fyte v. Fyte (1607), Monro, op. cit. 88; Wickham v. Dighton (1607), ibid 109-110—the excuses were that the legacies were left to infants with a trust for their maintenance, that the defendant was decayed in his estate, and that the plaintiffs would be unable to discover the amount of their legacies when they fell due—"which suggestions (if they be true) do contain sufficient matter of equity"; Gwinne v. Hobbes (1616), ibid 239—here, "whilst the cause depended in the ecclesiastical court the executrix died, and so the plaintiffs were left remediless to recover the legacy in that court"; cp. Crocker v. Hambden (1577-1578), Choyce Cases 118; occasionally the Council interfered, Dasent viii 27 (1571)—a legacy to Oxford University.

[7] More v. More (1579), Choyce Cases 134; and cp. Tothill 129, 130.

[8] Carter v. Maund (1626), Tothill 51.

money was payable at a future date,[1] the method of payment where legacies were given to a class of children on the attainment of twenty-one,[2] and questions of construction.[3] And, in dealing with these questions of construction, we can see the germs of some important doctrines of equity. We see some hints of the doctrine that a portion may be satisfied by a legacy or a devise,[4] and that a legacy may be adeemed by a portion,[5] and perhaps of the leaning of the court against double portions in order that charges on the land might not be multiplied.[6] But it would seem that as yet there is no sign of the doctrine of conversion.[7]

The extent of the equitable jurisdiction over wills of personalty was as yet very uncertain. The court seems occasionally to have determined questions as to whether a document propounded was in fact a will,[8] as to whether there had been a revocation of a will,[9] and as to whether a testator had capacity to make a will.[10] But there are signs that, at the end of this period, it was abandoning the two first of these pieces of jurisdiction.[11] It is clear, however, that it has assumed what was to be its chief function in relation to wills—the determination of questions of construction.[12]

[1] Vintner v. Pix (1639-1640), 1 Ch. Rep. 133.
[2] Mauter v. Fotherby (1634-1635), Nels. 25.
[3] See cases cited by Tothill 129, 130.
[4] Peacock v. Glascock (1630-1631), 1 Ch. Rep. 45-46.
[5] Kirrington v. Astie (1637). Tothill 78.
[6] Lake v. Lake (1634-1635), 1 Ch. Rep. 77—the report which is a mere note, runs as follows:—"This case is touching a double portion. This Court conceived the £500 was included in the Will, though charged by deed on lands"; cp. Ashburner, Equity 680 n. *a*; the authorities there cited seem to bear out his proposition that the doctrine "was originally intended to prevent the duplication of charges on lands; and it was only applied in favour of an heir-at-law as against younger sons or daughters"; Lake v. Lake would thus seem to be an early illustration of the primitive form of the doctrine.
[7] Wentworth v. Young (1638-1639), Nels. 36—in that case the plaintiff married the defendant's daughter and had £1500 on the marriage; his wife died leaving two daughters; he agreed with the defendant to settle this £1500 and another £1500 on them to be invested in land, and paid to them at twenty-one or marriage; "the Court was of opinion, that if the money had been laid out in land pursuant to the articles, and the children had died before the time of payment, the lands would have gone to their heir; but since it was in money, and if they both should die before it became payable, that it should go to the father, and to his executors or administrators."
[8] Thimblethorp v. Thimblethorp (1622), Tothill 188.
[9] Eyre v. Wortley, Tothill 173; Moggeridge v. Wither (1637-1638), ibid 189; Barker v. Zouch (1629-1630), 1 Ch. Rep. 42-43; Thomas v. North (1641-1642), ibid 153-154. The last two cases were cases of a devise.
[10] Herbert v. Lowns (1627-1628), 1 Ch. Rep. 22-25.
[11] Lucas v. Burgis (1573), Monro, op. cit. 398—a question as to the validity of a will referred to two masters; Mayor of Faversham v. Parke (1574), ibid 410—the same question referred to two civilian masters; Cocken v. Dary (1585), ibid 547, a suit as to the proof of a will not entertained pending proceedings in the ecclesiastical court; Browne v. Ricards (1600), ibid 761, a suit as to the validity of a will referred to the ecclesiastical court; Pawlet v. Cary (1625), Tothill 188; Cage v. Pearse (1612-1613), ibid.
[12] See e.g. Sidenham v. Courtney (1598-1599), Tothill 189; Revet v. Rowe (1634-1635), 1 Ch. Rep. 80-83.



(2) In the law of suretyship it was settled that giving time to the principal debtor,[1] or other alteration of the relation of the principal debtor and creditor to the prejudice of the surety without his knowledge,[2] discharged the contract. At one time it was laid down that the bankruptcy of the principal debtor gave the surety some title to relief;[3] but this rather absurd decision was soon overruled.[4] The court always interfered to enforce contribution between joint debtors;[5] and in several cases it applied this principle to co-sureties.[6]

*Specific Relief.*

During this period the specific relief given by the court of Chancery was beginning to be capable of division into categories which will, in the future, give rise to distinct legal topics. Firstly, there is the specific relief given in relation to contracts. Secondly, there are certain forms of specific relief given in relation to the law of property, real and personal. Thirdly, there is the specific relief given in cases of tort. In connection with all these categories the peculiar equitable remedy of injunction, mandatory or prohibitive, plays a large part.

(1) *Contract.*—It was during this period that the court of Chancery abandoned what we may call the canonist theory of contract[7] for the new theory of contract derived from the successive extensions of the action of assumpsit,[8] and based on the doctrine of consideration, which the common law courts were working out.[9] This comes out clearly enough in the reports. In a note in Cary's reports the older theory based on *laesio fidei* is quoted from a Year Book of Edward IV.'s reign.[10] But it is quite clear that it had ceased to be law, as, in another note, the reporter cites Dyer to prove that consideration, in the sense in which that term was used by the common lawyers, is necessary to the validity of a contract;[11] and in 1631 it was held that "a general and voluntary promise (and no consideration) of the son,

[1] Cary 1, citing Y.B. 9 Ed. IV. Mich. pl. 26.
[2] Saunders v. Churchill (1613), Tothill 181-182; Hare v. Michell (1614-1615), ibid 182; Moile v. Lord Roberts (1629-1630), ibid.
[3] Johnson v. Pudicot (1612), Tothill 181.
[4] Little v. Good (1618), ibid.
[5] Dolman v. Vavasor (1579-1580), Cary 92-93; R. v. Colborne (1578-1579), ibid 111-112; Reeve v. Harward (1581-1582), Choyce Cases 152.
[6] Peter v. Rich (1629-1630), 1 Ch. Rep. 34-36; Morgan v. Seymour (1637-1638), ibid 120-121; and cp. cases cited by Tothill at p. 41.
[7] Above 294-296.
[8] Vol. iii 428-453.
[9] Vol. viii 2-48.
[10] At pp. 18-19.
[11] "A. delivereth twenty pounds to B. to the use of C., a woman, to be delivered her the day of her marriage. Before her marriage A. countermandeth it, and calleth home the money. C. shall not be aided in Chancery, because there is no consideration why she should have it," ibid 9. Writing was not necessary; provided that the contract was proved and was otherwise valid, it was enforced though only made verbally, Hunt v. Cheeseman (1612 or 1634), Tothill 65.

to disengage and pay the father's debts, where no advancement by the father" would not support a bill.[1] At the same time we shall see that, though equity accepted the common law doctrine of consideration as a test of the validity of a contract, it did not adopt this doctrine in relation to other matters in which consideration was a condition precedent to equitable relief.[2] In these cases it still adhered to the meanings which it had attached to consideration in relation to its doctrine as to uses.[3] For these purposes consideration must either consist in money or money's worth, or in near relationship; and these meanings are directly connected with the canonist doctrines.[4]

The development by the common law of an adequate theory of contract, and its acceptance by the court of Chancery, made a resort to equity less necessary than it had been in the preceding period. In fact, it was only necessary to resort to equity when some form of specific relief was needed.[5] The court of Chancery acted upon this view, and dismissed to law cases in which it was thought that damages were a sufficient remedy.[6] But it cannot be said that the practice was as yet perfectly clearly fixed. In 1639-1640 there was "a suit touching two horses, for which the defendant was to pay by doubling an oat," to which a demurrer, on the ground that an action on the case was a sufficient remedy, was overruled.[7] And in 1629-1630 the court heard a suit for £500 promised for the purpose of making the promisee a baronet.[8] On the other hand, a contract to surrender a lease and certain tithes for 100 marks was dismissed, to be decided at common law.[9] But it is clear from the cases that it was most commonly in connection with contracts to grant some interest in land that the court was asked to act. There are two reasons for this. Not only were damages not a sufficient remedy in these cases, but also the contract did not, as in the case of chattels, pass the property.[10] It followed from the second of these reasons that there arose a need for specific relief which did not exist in the case of chattels, or in bodies of law in which the contract to sell

[1] Alexander v. Cresheld (1631), Tothill 21.
[2] Below 327 and n. 1. [3] Vol. iv 425-427. [4] Above 294-295.
[5] Cary 20; Crowder v. Robinson (1577), Choyce Cases 115; Brown v. North (1610), Tothill 162; Y.B. 21 Hy. VII. Mich. pl. 66, and Brook's note cited vol. i. 456 n. 9.
[6] Sutton v. Errington (1579-1580), Cary 97-98; cp. Cary 20—"and at this day, it is taken for a good cause of dismission in most causes, to say that he hath remedy at the common law."
[7] Rogers v. Smith, Tothill 17—possibly the reason for the retention of the suit was fraud or sharp practice.
[8] Russell v. Read, ibid 164—"A promise of five hundred pounds to make himself a baronet, would not pay it, yet decreed."
[9] Grevill v. Bowker (1579-1580), Choyce Cases 140.
[10] Vol. iii 438.



land operated as a conveyance.[1] We do not see as yet very many of the modern rules as to the conditions under which the court will grant this remedy; nor has the later distinction between specific relief upon executed contracts, and the specific performance of executory contracts,[2] been elaborated. We do, however, see that the court, especially in agreements relating to marriage settlements, pays great attention to the paramount intention of the parties.[3]

Thus the jurisdiction of the court over contracts was a much more restricted jurisdiction than in the preceding period. But it is not probable that the court lost on that account very much business. The prosperity of the country, and the changes in the land law which made elaborate settlements possible,[4] encouraged dealings with land which were unknown in the Middle Ages.

(2) *Property.*—Although the real actions made provision for specific relief in case of the infringement of a large number of rights relating to land,[5] and although the termor could get similar relief in an action of ejectment,[6] there were still many cases in which the jurisdiction of the court of Chancery was either convenient or necessary. Firstly, the real actions were decaying, and their place was being rapidly taken by the action of ejectment.[7] We shall see that this action was not conclusive even upon the parties to it. Therefore it was always possible to bring, and to go on bringing, new actions.[8] Hence we get applications to the court of Chancery for an injunction "to quiet possession" by stopping these repeated actions.[9] On similar principles the court would issue an injunction to secure the tenant's possession during the hearing of the suit,[10] or until further order was made.[11]

[1] See L.Q.R. xvii 372-373; Mr. Amos there says—"the greater part of the English law on the subject of specific performance of contracts is concerned with the execution of contracts to convey. . . . A very ample and effective equivalent to this branch of the English doctrine of specific relief seems to be afforded in French law by the translative effect which is attached by the Code to a simple convention to transfer property."
[2] Ashburner, Equity 534 n (s).
[3] See e.g. Lyddal v. Vanlore (1626-1627), 1 Ch. Rep. 9-13, where an agreement was decreed though it varied a settlement already executed; Wiseman v. Roper (1645-1646), ibid 150—a covenant to settle lands of which the covenantor had no possession, but only a possibility of inheriting; having inherited them, specific performance of the covenant was decreed; "This Court do find warranted by the Precedents and constant practice of this court, where such agreements have been made, upon which the party can only recover damages at law, for this court to decree the thing in specie, wherein this court doth not bind the interest of the lands, but inforce the party to perform his own agreement," ibid at p. 160.
[4] See last note; and cp. Arnold v. Barrington (1631), Dick. 5.
[5] Vol. iii 3-26; cp. vol. ii 246-249. [6] Vol. iii 216-217.
[7] Vol. vii 9. [8] Ibid 16-17.
[9] Sapcote v. Newport (1559-1560), Cary 47; Denis v. Carew (1618-1619), Tothill 63; and see ibid 112, 114.
[10] Hawkes v. Champion (1558), Cary 36; Carle v. Clerk (1590), Monro, Acta Cancellaria 605-606.
[11] Hinkersfield v. Bailly (1558), Monro, op. cit. 333.

Secondly, an injunction was useful to secure the performance of the duties of landlords and tenants. Thus in 1560-1561 the plaintiff had made a title by parol lease to certain lands belonging to the defendant, and, having done so, had sown the land with corn. Thereupon the defendant had entered upon him; but the plaintiff "had an injunction for the corn."[1] Conversely, in 1563-1564 it was decreed that the defendant should pay a certain rent to the plaintiff, the lord of the manor of whom he held; that he should do suit and service at the plaintiff's court; and that the plaintiff was entitled to the fines and amerciaments for the trespasses presented at the court of his manor.[2] Thirdly, injunctions were issued to constitute or to declare the existence of easements, profits, or rights analogous thereto.[3] Fourthly, they were issued to enforce inclosure[4] and other awards,[5] and even the bylaws of townships.[6] Fifthly, they were issued as a result of decrees as to the copyhold status of land held of a manor. In Edward VI.'s reign there was a decree in favour of the defendant who claimed that his lands were ancient copyhold and not leasehold.[7] We have seen that the establishment of the fact that lands were ancient copyhold gave the tenant a very much more favourable position than the leaseholder, because he could invoke the protection of the manorial custom which was now enforced by all the king's courts.[8]

We do not find many cases in which specific relief was given in connection with chattels. But there is one clear case of 1516 in which "a tablet or pomander of gold," given by the plaintiff to the defendant "at such time as he was a suitor for marriage to the defendant," was ordered to be restored.[9]

(3) *Tort.*—At this period the specific relief given in aid of the law of property shades off into the specific relief given in aid of

[1] Harrison v. Chomeley (1560-1561), Cary 51.
[2] Litton v. Couper (1563-1564), Cary 51-52.
[3] "Wotton *contra* Wotton, a highway decreed in 10 Car. Powell *contra* Parsons, a piece of ground sold, but no reservation of a highway, but decreed that a way should be continued as formerly, Mich. 3 Car.," Tothill 70; Lawrence v. Windham (1576-1577), Cary 64—suit for common of pasture and turbary.
[4] Tothill 110-112.
[5] Burtet v. Redman (1559-1560), Cary 47—an award as to a custom of tenant right made by the justices of assize.
[6] "Shipwaie *contra* Pilkington, concerning the decreeing of by-laws for the good of a town, a decree in 5 Car., and a decree in 25 Eliz.," Tothill 66.
[7] "Rotulo Judicial, E 6, 4 pars. A decree between Fotheringhall and Edsington defendant, the question was touching certain lands which the plaintiff claimed by lease, and which the defendant claimed as copyhold; and forasmuch as he failed in the proof, and the defendant showed his copy and ancient court rolls, proving it to be ancient copyhold, therefore the lands were decreed to the defendant according to his copy . . . till the plaintiff should prove a better title before the council at York," Tothill 59-60.
[8] Vol. iii 211-212.
[9] Young v. Burrel (1576), Cary 54-55.



the law of tort, as nearly all the torts against which an injunction was sought were, at this period, torts to property.[1] Thus we get injunctions against waste,[2] against "sowing ridges which lie in sheep course,"[3] against ploughing up ancient pasture,[4] against interference with the right of support.[5] Similarly an injunction was applied for against a nuisance caused by the erection of a mill, and the diversion of water from the plaintiff's mill; but as the plaintiff had, since the filing of his bill, brought an assize of nuisance, the suit was dismissed.[6] Generally, however, in cases of nuisance the court would award an injunction.[7]

In many of these cases the injunction was interlocutory. It was granted only till the hearing of the suit. Also it is clear that some of these injunctions were mandatory, others simply prohibitive. It would appear therefore that the main division between the different varieties of injunctions has been reached.

With what was at this period perhaps the most practically important class of injunctions—those issued against proceedings at common law—I shall deal under the following head :—

*Relief against the rigidity of the law.*

This is still a large subject which comprises a number of miscellaneous topics, some of which will in the future give rise to quite separate equitable doctrines. In this period this separation has not yet been attained. All these topics are still connected by the fact that for one reason or another the law left to itself would work injustice. But we see some of the lines upon which separation will proceed; and I shall therefore group these topics upon these lines. Firstly, I shall deal with a group of cases in which equity gave relief on account of the peculiar circumstances of the case, or the personal conduct of the parties. Secondly, two specific instances of such relief—relief against penalties and the relief given to mortgagors—were becoming distinct heads of equitable interference. Thirdly, there are a group of cases in which the fault lies with the rules of law. Two important illustrations of this are the deficiencies of the law of evidence, and the

[1] "Where an action upon the case for a nusans, and damages only are to be recovered, the party may have help here to remove or restore the thing itself," Cary 20.
[2] E.g. Petetson v. Shelley (1577), Choyce Cases 117; Tothill, 143-144—various cases as to ploughing up pasture; Cary 26; the Council also issued injunctions in these cases, see e.g. Dasent xxiii 308, 316-318 (1592).
[3] Kitson v. Cropley (1595), Tothill 65-66.
[4] Ibid 143-144.
[5] Bush v. Field (1579-1580), Cary 90.
[6] Osburne v. Barter (1583-1584), Choyce Cases 176.
[7] Swayne v. Rogers (1604), Cary 26—"the case was in effect an assize of nusans, for Rogers disturning the trenches and plucking up of stakes of Swayne's mill leet; and making a bank or dam beneath, that made the water reflow so as the wheels could not go; and exception was taken that the Court should not hold plea thereof (*sed contrarium adjudicatur*), many causes of the same manner ended here."

treatment by the law of choses in action. Lastly, there are cases turning upon the means by which these interferences were rendered effectual—injunctions to stop proceedings at common law.

(1) The first group, in which equity gave relief on account of the peculiar circumstances of the case or the personal conduct of the parties, includes relief given in cases of accident or mistake, duress or undue influence, and fraud. It is clear that the extent of the equitable jurisdiction in this class of cases will to a large extent depend on the provision made by the law to redress damage occurring through these events. All through this period the law made such scanty provision that the judges themselves admitted the necessity for the equitable jurisdiction.[1] It is a jurisdiction which in later days will diminish with reforms of the common law; but at this period it is extensive because it is exercised to redress the rigidity of many different branches of the law.

(i) It is exercised in connection with the law of procedure. As we have seen, the claim of the Chancery to issue injunctions against the execution of judgments given by the common law courts was rightly defended upon the ground that these judgments were often given without any reference to the conduct of the parties, and were sometimes got by very sharp practice.[2] Equity interfered if it thought that in the circumstances the parties were making an unrighteous use of their legal rights—thus it stopped an action for dower when the widow had got the jointure which she had been promised.[3] Similarly it stopped a common law action if it thought that the methods of trial at common law were not in the circumstances well adapted to discover the truth—in one case Egerton said that the matter "rested not properly in notice *de pais*, but to be discerned by books and deeds of which the Court was better able to judge than a jury of ploughmen."[4] On the other hand, the court was always ready to dissolve such an injunction if it appeared it had been got on inadequate grounds.[5]

(ii) In the law of property the jurisdiction was also exercised

[1] The King's order and decree in Chancery, Cary 119-120—"We find that the judges themselves in their own courts, when there appeared unto them matter of equity, because they by their oath and office could not stay the judgments, except it be for some small time, have directed the parties to seek relief in Chancery"; see e.g. Bracebridge v. Bracebridge (1581), Choyce Cases 149.

[2] Vol. i 461-462. [3] Rose v. Reinolds (1581), Choyce Cases, 147.

[4] Clench v. Tomley (1603), Cary 23; cp. Martin v. Hampton (1578-1579), Choyce Cases 129—a bill for trover and conversion, answer not guilty, a better answer ordered; it was probably to get this better answer that the suit in equity was brought; Quick v. St. Cleere (1581-1582), ibid 151-152.

[5] Hales v. Stanebridge (1559-1560), Cary 49-50.



extensively. Thus the court would correct a conveyance so as to bring it in conformity with the obvious intention of the parties to it. In an early case it was said that "the Chancery giveth help for perfecting of things well meant and upon good consideration. As if in a feoffment of lands for money the words 'heirs' be omitted in the deeds";[1] and in Charles I.'s reign it was held that "when the father conceives his lands to be freehold, [and] gives part thereof to a younger son, although an old sleeping entail be set on foot [this] shall not prejudice the younger son."[2] The exercise of this jurisdiction somewhat easily slides off into a jurisdiction to interpret doubtful words in conveyances so as to make them conform to the intentions of the parties.[3] Similarly the court would supply the defect of some "circumstance of ceremony"—"as if a man sells land in two counties for money, and maketh livery in the one only, he shall be compelled in conscience to perfect the assurance by another livery";[4] or it would supply other obvious omissions or mistakes such as the misnomer of a corporation[5] or a person,[6] a misrecital of a record owing to a clerical error,[7] a clerical error in a deed,[8] certain mistakes in the exercise or recital of powers.[9]

(iii) The court would also rectify similar mistakes in bonds and other contracts. Thus, "the plaintiff became surety for the defendant to one Buck in a bond of one hundred pounds, and the defendant giving a counter bond to save the plaintiff harmless of a bond of two hundred pounds, whereby, by the mistaking, the counter bond was void by law, yet relieved here."[10] And it exercised a jurisdiction to give relief if by mistake the expressed intention of the parties to a contract did not correspond to their real intention. For instance when the parties had given each other general releases, but clearly did not mean to include in them a certain bond, it was decreed that, as to the bond, no advantage was to be taken of the release.[11] Similarly it was necessary

[1] Cary 16-17.

[2] Pountney v. Pilkington (1642-1643) Tothill 54; cp. the cases cited ibid 127, 128.

[3] "A lease made to two during their lives, and after to the use of such of the children begotten by Peter Rumney, this being without any express conclusion what child or children, the construction touching the uses is to be made as near as may be, to the meaning of the said parties, who conveyed the same to uses," Rumney v. Garnous (1594) Tothill 126.

[4] Cary 17, citing the Doctor and Student.

[5] Ibid 31; Choyce Cases 108—"*Nota* by the L. Chancellor Elsemere said, that it is no conscience for a Corporation to avoid their grant by a misnomer."

[6] Goodfellow v. Morris (1618) Tothill 131.

[7] Culpepper v. Decanum and Coll. Winton (1557) ibid.

[8] Bleverhasset v. Fuller (1594-1595) ibid.

[9] Comitissa Oxon. v. Stanhop (1632) ibid 132.

[10] Griffin v. Sayer (1613) ibid 131-132.

[11] Merrick v. Mil (1649) Nels. 48-49; cp. Tisdal v. Danvers (1612-1613) Tothill 28; the Council also exercised a similar jurisdiction, Dasent xi 101 (1579).

to come to equity for relief in cases when circumstances over which the parties had no control made the performance of a contract impossible.[1] Sometimes relief was given, though there was a legal remedy, if it appeared that the legal remedy, owing, e.g. to the death of witnesses, might not be efficacious.[2] What limit there was to this wide jurisdiction does not as yet clearly appear.[3] It is not till later that its extent and the conditions of its application begin to emerge clearly.

(iv) A fortiori the court would relieve against loss caused to one party by the misconduct of the other. On this principle it relieved against duress, undue influence, and fraud. In the case of duress the common law gave a remedy; but it would seem that at this period the court of Chancery exercised a concurrent jurisdiction.[4] But the common law did not profess to give relief against the more subtle forms of oppression which are comprised in the phrase "undue influence." Thus in 1627-1628 it was held that a scrivener, who had the management of a testator's property, and who had used his position to get advantages for himself, could not benefit thereby.[5] In an earlier case a plaintiff had recovered her dower at common law; but the defendant "being rich and wilful" prevented her benefiting thereby. At the request of the judges, the chancellor put a stop to this oppression by issuing an injunction to establish her in possession of her dower.[6] There are many cases in which the court relieved against fraud and sharp practice. Thus it relieved a lessee from a forfeiture arranged for by a fraudulent trick of the lessor.[7] It compelled a purchaser to repay money received for a reversion of which he could not give the vendor the stipulated enjoyment.[8] Conversely it compelled a reconveyance when a condition, which would have made the conveyance defeasible in the events which had happened, was fraudulently omitted.[1] It rescinded contracts induced by fraud;[2] and in one case it relieved a person who had been enticed into a gambling house where false dice were used, and had borrowed money from one of the confederates to go on playing.[3]

[1] Kyrwyn v. Bedoe (1585) Monro 543-544—a contract to build a house made impossible by royal proclamation; Pope v. Barker (1598) ibid 723-724—bond to marry a woman before Easter who fell dangerously ill before that date, and soon after died.

[2] "This suit is to be relieved of a bond of 200 marks made for payment of 100 marks delivered as an escrome, to be delivered as his deed, if the 100 marks for which the bond was made, was paid. The defendant demurred, because the plaintiff may have remedy by law, if the bond were delivered upon such condition; but because the witnesses that could testifie the delivery of it are dead; therefore the defendant is ordered to make a full answer," Fox v. Wilcocks (1578-1579) Choyce Cases 123.

[3] In Meld v. Cooper (1582-1583) Tothill 122 the opinion was expressed that, "no continuance would make a void lease good especially against a purchaser;" but in Griffin v. Sayer (1613) ibid 131-132, relief was given where a counter bond was void at law.

[4] "Bonds cancelled which have been entered into *per* menaces, threats, and imprisonments," Watts v. Lock (1628-1629) Tothill 26.

[5] Herbert v. Lowns (1627-1628) 1 Ch. Rep. 22-25; cp. Aynsworth v. Pollard (1635-1636) ibid 101.

[6] Bracebridge v. Bracebridge (1581) Choyce Cases 149.

[7] Gardiner v. Ugnall (1578-1579) Choyce Cases 128-129; the Council sometimes interfered, e.g. it ordered a person who had a lease in his possession not to part with it to the reversioner, who wished to get it that it might be destroyed by merger, Dasent ix 162 (1576).

[8] Pickton v. Lidcote (1578-1579) Choyce Cases 139, 140.



In all these cases in which a plaintiff applied for relief either on the ground of the peculiar circumstances of the case, or on the ground of the misconduct of the defendant, it was essential that the application should be made promptly, as the evidence upon which applications of this kind were made is somewhat easily forgotten. It is true that the statutes of limitation were not applicable to certain purely equitable claims;[4] and how far the court was prepared to subject equitable titles to analogous rules was doubtful,[5] because as yet the statutes of limitation were but new.[6] But it was quite clear that equity was not prepared to assist those who slept upon their rights. Thus it would not disturb a possession long enjoyed—"Upon the hearing of the matter it appeareth, that the lands in question have been in the defendants and their possession by whom they claime of the space of eighty years; therefore ordered and decreed the defendants to be dismissed."[7] A mortgagor's claim to redeem was refused because those claiming under the mortgagee had been in possession for forty years;[8] and lapse of time without any claim for payment by a mortgagee was held to bar his rights.[9] The same principle was applied to actions on bonds,[10] to liabilities to pay rent[11] or rent charges[12] or legacies,[13] and to the validity of conveyances.[14] A fortiori the plaintiff could not succeed in getting relief if the loss had occurred through his own misconduct. A

[1] Birket v. Beresey (1581) Choyce Cases 146—the conveyance was to be void if an intended marriage did not take effect.

[2] Otby v. Daniel (1629-1630) Tothill 26; Cuddington v. Hutton (1610-1611) ibid 170.

[3] Blackwell v. Redman (1634-1635) 1 Ch. Rep. 88.

[4] Halstead v. Little (1632) Tothill 53; Evans v. Leasure (1630-1631) ibid 75.

[5] See Cary 4, 5, citing the Doctor and Student on the question whether the lapse of five years after levying of a fine would have the same effect in equity as at law.

[6] Vol. iv 484-486, 499, 525, 533.

[7] Blackwell v. Simpson (1582-1583) Choyce Cases 163; cp. Clench v. Tomley (1603) Cary 23; Porter v. Pretty (1604) Choyce Cases 105-106; Winchcomb v. Hall (1629-1630) 1 Ch. Rep. 40, 41.

[8] Sedgwick v. Evan (1582-1583) Choyce Cases 167.

[9] Sibson v. Fletcher (1632-1633) 1 Ch. Rep. 59, 60; Hales v. Hales (1636-1637) ibid 105.

[10] Garford v. Humble (1618) Tothill 26; Moyle v. Lord Roberts (1629-1630) Nels. 9, 10.

[11] Tothill 172. [12] Churchill v. Brewer (1635) ibid.

[13] Simons v. Lee (1613) ibid 129.

[14] "The defendant would avoid an estate for want of livery and seisin, but because the plaintiff enjoyed twenty-five years, it was decreed he should enjoy it quietly," Byden v. Loveden (1613) Tothill 54.

plaintiff applied for an injunction to stop an action on the case for words on the ground that he was drunk when he uttered them. The application was refused—"Qui peccat ebrius, luat sobrius."[1]

(2) A specific instance of the exercise of the jurisdiction to give relief against accident or sharp practice is the treatment by the court of conditions and stipulations of a penal character. It was one of the oldest of the cases of equitable interference;[2] and by this period was almost a separate branch of the equitable jurisdiction. At bottom it rests upon the idea that it is not fair that a person should use his legal rights to take advantage of another's misfortune, and still less that he should scheme to get legal rights with this object in view. The principle both of the older and of the more recent cases is stated quite clearly by Cary:[3] "If a man be bound in a penalty to pay money at a day and place, by obligation, and intending to pay the same, is robbed by the way; or hath intreated by word some other respite at the hands of the obligee, or cometh short of the place by any misfortune;[4] and so failing of the payment, doth nevertheless provide and tender the money in short time after; in these, and many such like cases, the Chancery will compel the obligee to take his principal, with some reasonable consideration of his damages." Similarly, "If the obligee have received the most part of the money, payable upon the obligation at the peremptory time and place, and will nevertheless extend the whole forfeiture immediately, refusing soon after the default to accept of the residue rendered unto him, the obligee may find aid in Chancery." And, "the like favour is extendable against them that will take advantage upon any strict condition, for undoing the estate of another in lands, upon a small or trifling default."[5] These were principles upon which the mediæval chancellors had acted. During this period their most striking development is to be found in their application to the relations of mortgagor and mortgagee.

We have seen that, in the latter half of the fifteenth century, the older forms of mortgage were tending to disappear; and that the type of mortgage which had survived gave the mortgagee the fee simple, or other the whole estate of the mortgagor, with a proviso that, if the debt was paid by a fixed date, the land should be reconveyed.[6] The strictness with which this proviso

[1] Kendrick v. Hopkins (1579-1580) Cary 93; and cp. Power v. Coppinger (1615) Monro, op. cit. 219, 220—a bill to be relieved of a debt incurred through gaming dismissed, as it appeared from the plaintiff's confession that the plaintiff was "distempered by wine."

[2] Above 293.

[3] At pp. 1, 2.

[4] Cp. Franclyn v. Watkyns (1579) Monro, op. cit. 487-488.

[5] Cp. also Underwood v. Swain (1649) 1 Ch. Rep. 161-162.

[6] Vol. iii 130.



was construed made a recourse to equity very necessary; and we have seen that equity was ready to interpose, either on the ground that payment had been prevented by the sharp practice of the mortgagee,[1] or on the ground that the strict construction of the proviso might amount, in cases when payment had been delayed by accident, to the enforcement of a penalty,[2] or possibly on the ground that it might be tantamount to the enforcement of an usurious contract.[3] But towards the end of the sixteenth and at the beginning of the seventeenth century there was a further development. It seems to have been thought that a mortgage was, after all, only a security for a debt; and that therefore the title to equitable relief did not depend upon the reason why the mortgagor had failed to redeem at the day, or upon the nature of the contract. It was enough that it was a mortgage transaction intended to secure to the mortgagee a fixed sum and interest thereon, and subject thereto to leave the mortgagor substantially the owner of the property.

The results of this view were, firstly, that a mortgagor could always apply for relief within a reasonable time[4] after the period fixed for redemption;[5] secondly, that the mortgagee must account for any profits received by him in excess of the sum due and interest thereon;[6] and, thirdly, that the mortgagee could not by his own act, e.g. by expensive improvements to the mortgaged property, clog the mortgagor's equitable right to redeem.[7] On the other hand it was recognized that it would not be fair to the mortgagee to prevent him from dealing with the property as his own, if he could not get payment. About the same period therefore we get the foreclosure decree, which cuts short the mortgagor's equitable right to redeem unless he pays by a fixed

[1] Courtman v. Convers (1601) Monro, op. cit. 764-765.

[2] Above 293, 330.

[3] We do not find much authority for this; but in the case of Langford v. Barnard (1594-1596) Tothill 134, it is said—"the Court decreed money to the plaintiff against the defendant, albeit he had judgment and execution, being upon the point of usurious contract, and a lease being become forfeited, and the mortgagee devised the same to infants. The Court was of opinion that the plaintiff should have it again, paying the money;" it is not clear that the usurious contract had anything to do with the mortgage, see on the whole subject, vol. vi 664 n. 6.

[4] Above 329.

[5] Hanmer and Lochard (1612) Tothill 132—"a mortgagor relieved after the day of redemption notwithstanding it was in infants' hands, and a purchase;" Bacon v. Bacon (1639-1640) ibid 133—"The Court will relieve a mortgage to the tenth generation, though the purchaser had no notice."

[6] Holman v. Vaux (about 1616) Tothill 133; Pell v. Blewet (1630-1631) ibid—"Concerning a mortgage, and how the mortgagee shall account for profits received, and what casualties shall be allowed, and whether any;" cp. Lucas v. Pennington (1629-1630) Nels. 8, 9.

[7] In Bacon v. Bacon (1639-1640) Tothill 133-134, it is said that the court will relieve "in some cases when the mortgagee will suddenly bestow unnecessary costs upon the mortgaged lands of purposes to clog the lands, to prevent the mortgagor's redemption."

date.[1] These results were only gradually reached;[2] but when they had been reached, it became clear that this equitable right to redeem was in substance an equitable estate in the land which could be conveyed or settled like any other estate.[3] Until, however, this equity to redeem had been exercised, the legal estate in the mortgaged property, and the right to get a decree for foreclosure, went, in the absence of testamentary disposition,[4] to the heir of the mortgagee.[5] But as yet the rights and liabilities of the heirs and executors of mortgagor and mortgagee were by no means clearly settled.

(3) Thirdly, we come to the cases where the relief given by equity was based, not so much upon the conduct of the parties in taking advantage of rigid rules of law, as upon the hardness or inadequacy of the rules themselves. The two topics which I have chosen to illustrate this aspect of the equitable jurisdiction are the law of evidence, and the law as to the assignment of choses in action.

In relation to the law of evidence equity seems at this period to have acted in three main directions. It helped to combat the rigidity of the law; it laid down certain rules in which we may see some germs of important principles of our modern law of evidence; and it laid down certain rules for the exercise of its own jurisdiction. (i) As in the preceding period, it helped to combat the rigidity of the law by granting discovery in aid of legal proceedings.[6] Two of the Year Book cases are cited by Cary;[7] and many other cases are cited by Tothill. In one of these cases the defendant was forced to disclose the name of the person to whom he had assigned his lease, "otherwise the lessor would have no action for waste; and to disclose the names of the persons whom he had caused to fell trees, so that the lessor might sue them."[8] Similarly it entertained suits to perpetuate

[1] How v. Vigures (1628-1629) 1 Ch. Rep. 32-33.

[2] We can illustrate the fact that the recognition of the mortgagor's right was gradual by the following passage from Whitelock's Liber Fam. (C.S.) 29: "This term of St. Michael 1612 I lent my Lord Harington £3000 to redeem his manor of Lobthorp, which was fallen into the viscount of Rochester's hand, for the not payment of £3000, whiche sholde have been payd unto him on Allhallond day 1612, *yet the viscount was contented to receave his money after the day.*"

[3] Duchess of Hamilton v. Countess of Dirlton (1654) 1 Ch. Rep. 165 168.

[4] Earl of Carlisle v. Gober (1659) Nels. 52-54.

[5] This seems to have been the view finally reached, though the opinion of the court had fluctuated, cp. Ash v. Wood, and Maynard v. Middleton (1631-1632) Tothill 134, with St. John v. Grobham (1635) ibid.

[6] Above 281-282.

[7] At pp. 15, 16.

[8] Standen v. Bullock (1596) Tothill 9; cp. Pie v. Bevill (1635-1636) ibid 16—"the defendant ordered to show evidence, to direct what tenants ought to attorn, and to discover who is tenant;" Creswell v. Luther (1577) ibid 20—"a bill to find who is tenant of the land whereby to ground an action;" Earl of Pembroke v. Bostock (1626-1627) ibid 164—"a bill to discover a patron, whereby to enable one to bring *quare impedit;*" Gifford v. Tripconey (1582-1583) Choyce Cases 163—the defendant ordered to produce a lease which the plaintiff contended gave him a joint estate with the defendant.



testimony, if there was a risk that essential evidence would be lost.[1] (ii) Of the rules which developed into important principles of the modern law of evidence the following illustrations are the most important:—A person was not obliged to answer if by so doing he exposed himself to the risk of criminal proceedings,[2] though possibly the fact that he might be exposed to civil proceedings was no bar.[3] A person was not allowed to depose that he "had heard say" that a lease had been made;[4] and, if parol evidence was offered to prove the execution of a lost deed, the witness must swear, not merely that he saw the deed, but that he saw it sealed and delivered.[5] The right of solicitors and counsel to refuse to answer as to matters which had come to their knowledge professionally was well established;[6] and it was even laid down that trustees could not be examined as witnesses one against the other.[7] (iii) In the exercise of its own jurisdiction the Chancery showed itself very suspicious of leases and other agreements which were not evidenced by writing. In 1603 Lord Ellesmere said that he would give no help to parol leases;[8] "and that it was good for the commonwealth, if no lease parol were allowed by the law, nor promises to be proved by witnesses, considering the plenty of witnesses nowadays, which were *testes diabolices qui*

[1] Hearing v. Fisher (1578-1579) Cary 110; Southall v. Peryn (1583-1584) Choyce Cases 179; Throckmorton v. Griffin (1595) Tothill 18; Potts v. Scarborough (1635-1636) ibid 23; cp. Coote v. Davenport (1594) Monro, op. cit. 660—examination of a witness because he was on the point of going abroad.

[2] "The Vice-Countess Montague claimed the wardship of the body of the heir of a tenant of hers, which was esloined from her; she suspecting some of the heir's friends, exhibited her bill in Chancery; and it seemed they should not answer to charge themselves criminally; especially in this case, where so great a punishment as abjuration may follow, etc.," Cary 9.

[3] In Wolgrave v. Coe (1595) Tothill 18, a defendant was excused from answering as his answer might expose him to forfeiture of a bond; but in Eland v. Cottington (1606) ibid 12, a defendant was ordered to answer "though it be to his prejudice by statute laws."

[4] "The defendant divided his title by a lease and assignment, which was before his knowledge, and therefore pleaded that he heard say, that such a lease and assignment was made; the Master of the Rolls was of opinion, because it was another's act, the oath is, that he thinks it to be true," Burgony v. Machell (1594-1595) Tothill 8.

[5] "A release was offered to be deposed, that it had been seen by some at the bar, it being affirmed that by casual means it was lost; but the Lord Chancellor said, the oath should be, that he saw it sealed and delivered, and not that he saw it after it was a deed: for in Munson, the Justice, his case, a deed was brought into the Chancery and a *vidimus* upon it, being but a counterfeit copy; and after the fraud discovered, and the true deed produced; therefore none allowance to be given of a deed, without producing the deed, or proving the execution thereof" (1603) Anon. Cary 31.

[6] Berd v. Lovelace (1576-1577) Cary 62—a solicitor; Austen v. Vesey (1577) ibid 63—a solicitor; Denis v. Codrington (1579-1580) ibid 100—counsel; Creed v. Trap (1578-1579) Choyce Cases 121—counsel and solicitor; Havers v. Randoll (1581) ibid 148—an attorney.

[7] Sherborne v. Foster (1631-1632) Tothill 187.

[8] Cary 27-28.

*magis fame quam fama moventur*"—the need for a statute of Frauds is already beginning to appear.[1] On the other hand, the Chancery generally accepted the evidence of depositions taken by such courts as the courts of Star Chamber,[2] Admiralty,[3] Exchequer,[4] or Wards and Liveries.[4] But, at this period, its own rules were by no means strictly kept.[5] Though, as a rule, no evidence was allowed after publication, there are cases in which witnesses were examined after that date;[6] and cases in which they were examined viva voce at the hearing,[7] and even after the hearing.[8] Occasionally also witnesses were examined after publication to inform the conscience of the judge.[9]

Of the attitude of the common law to choses in action I shall speak at length in the second Part of this Book.[10] We shall see that the common law considered the rights of the parties to a contract to be of so personal a character that they could not be assigned to a third person; and that it justly feared the increased opportunities for champerty and maintenance which any relaxation of this rule would have caused. Such rights it refused to regard as assignable property. The Chancery on the other hand had been instrumental in the creation of many forms of property which the common law courts ignored; and many of them were founded upon relationships of as personal a character as those arising out of contract. The interest of the cestuique use was from one point of view merely a personal relationship of confidence between him and the feoffee to uses—yet from the first it was regarded by equity as assignable property.[11] In other cases also, the equitable conception of property was wider than that of the common law. A mere possibility was treated as assignable property;[12] and the mortgagor's equity of redemption was regarded as an estate in the land.[13] The fact therefore that a right under a contract was regarded by the common law as a purely personal relationship was no bar to the adoption by the court of

[1] See also Cary 7 (1597-1598); Page v. Spenser (1581) Choyce Cases 148; Nichols v. Lorell (1583) ibid 171-172; but a parol argeement was occasionally enforced, see Cooke v. Trewman (1606) Tothill 69.
[2] Puckly v. Bridges (1582-1583) Choyce Cases 163.
[3] Watkins v. Fursland (1573-1574) Tothill 192.
[4] Morrison v. Wethired (1612-1613) Tothill 189.
[5] See the cases collected in Tothill 189-192; and cp. ibid 77.
[6] Allen v. Hawley (1617) Monro, Acta Cancellaria 254-255.
[7] Wright v. Moore (1630) Tothill 190.
[8] Veizey v. Veizey (1638) Tothill 192.
[9] Earl of Worcester v. Balgye (1569) Monro, op. cit. 375-376; Purserie v. Throgmorton (1581) Choyce Cases 148; Wynn's Case (1629-1630) Tothill 77; Dalby v. Mace (1606) ibid 191.
[10] Vol. vii 515-544.
[11] Vol. iv 432-443.
[12] Romney v. Garnous (1594-1595) Tothill 147; Warmstrey v. Lady Tanfield (1628-1629) 1 Ch. Rep. 29, 30; Povey v. Barker (1633-1634) Tothill 147.
[13] Above 332.



Chancery of a very different view. In fact that court regarded the right to receive a definite sum under a contract as property, and therefore assignable either inter vivos or after death.[1] Perhaps both the early association of the Chancery with mercantile business,[2] and the far more liberal conception which from the first it had held as to the enforceability of agreements,[3] helped it to arrive at this conclusion. The common law theory of contract was not fully developed till the end of the sixteenth century; and it was not till after that period that the common lawyers began to study and give effect to mercantile custom. Thus while the common law maintained its general prohibition, and merely allowed an exception in the case of negotiable instruments,[4] the Chancery developed its conception that under certain conditions a right under a contract was assignable property. But for the settlement both of these conditions, and of the means by which, under different circumstances, equity gave effect to these assignments, we must wait for the following period.[5]

(4) The method by which the Chancery succeeded in effecting these various modifications of the rigidity of the law was by addressing orders to the parties concerned, and by committing them and sometimes their legal advisers, to prison,[6] for contempt in case of disobedience. But it is obvious that these orders would have given no real relief if the parties could have continued to pursue their rights at law. Hence the ultimate resource of the Chancery, in a very large number of these cases, was the issue of an injunction against pursuing these legal proceedings, or, if judgment had been got, against enforcing the judgment. Thus injunctions were issued to stop abuses of process. In one case, the court stopped an action brought by A against a defendant merely to prevent him (the defendant) from giving evidence in another action brought by X against A;[7] and in another it stopped an action brought with knowledge that the defendant's witnesses were all beyond the sea.[8] On similar principles it issued injunctions to prevent the molestation of a tenant during an action on condition that he paid his rent into court,[9] and to stay the execution of a hard judgment got against an executor de son tort till the case was heard by the court of Chancery.[10] Injunctions both final and interlocutory to quiet

[1] Burrel v. Siday (1627-1628) Tothill 35—"a devise out of a chose in action, good in this Court;" Rock v. Guntur (1639) ibid—"assignee of chose in action."
[2] Above 116-117, 139-140.
[3] Above 295-296.
[4] Vol. viii 163-165; cp. above 144 n. 7, 145.
[5] Vol. vi 667.
[6] Allen v. Dingley (1576-1577) Choyce Cases 113, 114.
[7] Angrome v. Angrome (1583-1584) Choyce Cases 176.
[8] Swigo v. Hanbury (1581-1582) Choyce Cases 156.
[9] Alnete v. Bettam (1559-1560) Cary 46-47.
[10] North v. Kelewick (1559-1560) Cary 49.

possession [1] were essential in order that the court might definitely settle questions of ownership,[2] and enforce tenurial customs,[3] agreements as to inclosure,[4] and other similar agreements between a number of tenants in a manor or other district. Sometimes they were used to enforce a compromise between the parties to an action at law,[5] or to prevent a plaintiff from vexing the defendant by simultaneous actions at common law and in equity.[6] The number and variety of these injunctions show us that, in this litigious age, the power to issue them was the condition precedent for the exercise of this wide equitable jurisdiction to remedy the rigidity of the law.[7]

### *The Evolution of the Character of Equity*

We have seen that the theory underlying equitable interferences with the law made it necessary that equity should follow the law.[8] The views of the mediæval chancellors as to the relations between law and equity, and especially as to the extent to which equity ought to interfere with the law, had been ably summarized by St. Germain; and these views, as thus summarized, were acted upon all through this period.[9] But it is equally clear, that, in the absence of any fixed principles to guide the chancellor as to what course was in the circumstances equitable, the question whether in any given case relief should be granted, depended upon the view which the chancellor took of the facts of the case. The court of Chancery was a court of conscience; and the chancellor decreed for the plaintiff or the defendant as his conscience dictated.

The entire dependence of the principles of equity upon the conscience of one man was a useful weapon to the common lawyers. "For some men think," wrote the Serjeant,[10] "that if they tread upon two straws that lie across they offend in conscience, and some man thinketh that if he lack money, and another hath too much, that he may take part of his with conscience; and so divers men, divers conscience." Norburie,[11] writing soon after the fall of Bacon, said that, "the boundless power of the Chancery in not having rules and grounds written and prescribed unto it, in what cases it shall give relief and what not, is the cause of much discontent and distraction to the King's

[1] Sapcote v. Newport (1559-1560) Cary 47; Kidnere v. Harrison (1559-1560) ibid 48. [2] Vol. vii 17.
[3] Harper v. Midleton (1583-1584) Choyce Cases 180—an injunction against "raising new customes of tenant right" in Yorkshire; cp. vol. iii 257-259.
[4] Tothill 109-112; cp. vol. ii 60; vol. iv 369 n. 7.
[5] Stanebridge v. Hales (1559-1560) Cary 47-48.
[6] Bill v. Body (1559-1560) Cary 50.
[7] Apparently the Council could dissolve an injunction—at least there is one instance in which it did so, Dasent xvii 214-215 (1589). [8] Vol. iv 280-281.
[9] Cary 4, 5, 11, 12. [10] Harg. Law Tracts 326. [11] Ibid 430.



subjects, and clamours against the Lord Chancellor." Selden's well-known jest upon the variations of equity is another instance of the same sort of criticism.[1]

It is clear from Lambard that, at the close of the sixteenth century, the resulting uncertainty of the rules of equity was leading men to consider whether it was not possible to lay down some certain rules for the administration of equity, without destroying entirely that discretionary character of the relief given, which was its very essence.[2] He offers no solution of this problem. But, while he was writing, two sets of circumstances were beginning to modify the character of equity; and it is through this modification that the solution was destined eventually to come. Firstly, the political reasons which were tending to differentiate the jurisdiction of the chancellor from that of the Council, the Star Chamber, the court of Admiralty, and the ecclesiastical courts, and to settle the relations between the common law courts and the court of Chancery, were helping to settle the sphere of the court's jurisdiction. Secondly, the growth of the practice of citing cases as precedents was an influence which was helping, not only to settle still more exactly the sphere of the court's jurisdiction, but also to make some fixed rules for the exercise of the chancellor's discretion. But though, during this period, these two sets of circumstances were fast settling the sphere of the chancellor's jurisdiction, comparatively little progress had as yet been made in the fettering of his discretion in matters which fell within his jurisdiction. The chancellors still considered themselves very free to act whenever they thought that they could secure substantial justice by their action. In the *Earl of Oxford's Case*,[3] for instance, equity interfered with the operation of a statute in a manner which would have been impossible at a later period. In fact, during the whole of this period and later, the court of Chancery was actually, and not merely technically, a court of conscience.[4] For this

[1] Cited vol. i 467-468. [2] Archeion 83-85, cited above 275 n. 3.
[3] (1615) 1 Ch. Rep. 1; for another very similar case see Dasent, xvii 163-164 (1589).
[4] Danyell v. Jackson (1575) Monro, op. cit. 433—costs remitted in consideration of age, poverty, and simplicity of the plaintiff, who was "a very poor boy in very simple clothes and bare-legged and under the age of twelve years"; Nicholas v. Dutton (1597) ibid 694, it appeared the defendant gave £100 to the plaintiff at the motion of the lord chancellor (Hatton) "not in respect of any right or equity which the plaintiff had . . . but in respect of the plaintiff's poverty;" Throgmorton v. Loggen (1608) ibid 108—Master Grimeston, overruling an objection to want of certainty in a pleading, assigns as one of his reasons that, "it here resteth in a court of equity, where the right of poor and ignorant in the law is to be weighed"; Wilkey v. Dagge (1608) ibid 107-108—Master Tyndal assigns as one reason for giving relief in the case of a forfeited mortgage that the plaintiff was a poor man, "and am credibly informed that the defendants be hard dealing men, working to their advantage upon the simplicity of their poor neighbours. Wherefore I conceive it to be good equity to relieve the poor soul, and to stay all suits at the common law."

reason the contents of the rules of equity, and therefore the relation of equity to the law, continued to depend to a considerable extent upon the conscience of the chancellor. We can only see the remote beginnings of the causes which will, by settling the contents of these rules, make the court only technically a court of conscience; and, in these last days, enable a judge of the Chancery Division of the High Court to deny that it is in any sense a court of this character.[1]

In the chapter in which the history of the enacted law of this period is described, we saw that the political, economic, religious, and social changes of this period had necessitated large changes in and additions to the statute law. But these statutes necessarily left much scope to the courts which were entrusted with their enforcement and interpretation; and they did not cover by any means the whole ground. In this and the preceding chapter we have been chiefly concerned with the manner in which the courts, whose jurisdiction lay outside the sphere of the common law, seconded the legislature in the work of adapting the law of the state to the new conditions. We have seen that the courts and the lawyers administering the civil law helped to introduce English law to the new international law, and to improve both legal literature and legal theory; that both these courts and all the other courts of the state took a share in the foundation of some of the principles of our modern maritime and commercial law; that the Council and Star Chamber gave material assistance to the legislature in its efforts to improve the criminal law; and that the court of Chancery gave a legal recognition to many new social relations and business transactions which the strict rules of law could not or would not give. As a result we see, growing up by the side of the common law, new and rival bodies of law, and new and rival bodies of legal literature. But, during the latter part of the sixteenth and the beginning of the seventeenth centuries, there was a marked revival of the common law, and a consequent tendency on the part of the common lawyers to contest the claims of these rival courts to the spheres of jurisdiction which they had occupied. None of these spheres of jurisdiction was quite precisely defined; so that both the conflicting claims of these rival courts, and more especially the claims of the common law courts, provoked furious controversies in the English legal system. The revival and development of the common law, and the controversies to which they gave rise, are the subjects of the following chapter.

[1] "This court is not a court of conscience," *per* Buckley J. in re Telescriptor Syndicate [1903] 2 Ch. at pp. 195-196.

CHAPTER V

# ENGLISH LAW IN THE SIXTEENTH AND EARLY SEVENTEENTH CENTURIES (*Continued*)

## The Development of the Common Law

IN this chapter I shall, in the first place, give an account of the development of the common law during this period; and, in the second place, describe the relation of the common law to its rivals. With this second topic the name of Edward Coke must be coupled. His literary work and his judicial and political career were the decisive factors in settling permanently the nature of that relation, and thus give him a claim to be considered the central figure in English legal history.

### I.
### The Development of the Common Law

Something has already been said of the conditions under which the common law was being developed. We have seen that the professional training given by the Inns of Court was so thorough that it enabled the common lawyers, not only to hold their own, but also to influence the development of the new bodies of law which were growing up in those rival jurisdictions which have just been described.[1] On the other hand we have seen that the law administered in these rival jurisdictions influenced the common law. The new ideas thus introduced into the law tended to emancipate the common lawyers from that rigid technicality which had characterized their work in the fifteenth century,[2] and to make them ready to expand their system in many different directions. Thus we have seen that the law administered in the Star Chamber and the Chancery was influenced by the common law, and conversely that the new ideas and principles applied in those courts influenced the common law;[3] and that even in the Admiralty and Ecclesiastical jurisdictions, where the law administered depended mainly on the civil and canon law, this reciprocal influence exercised a smaller but still an appreciable effect. We have seen that the common law began to apply some of those rules of the Law

[1] Vol. iv 270-272. [2] Vol. ii 588-591. [3] Above 188-196, 300-302, 321-322.

Merchant which had come through the Admiralty;[1] and that the enforcement both of the statutes upon which the Reformation settlement depended, and of other statutes upon ecclesiastical matters, introduced a good many topics of ecclesiastical law to the notice of the common lawyers.[2] On the other hand, the practitioners in the court of Admiralty and the ecclesiastical courts were always obliged to keep before their minds those statutes and rules of the common law which created or defined or limited their jurisdiction.[3] Moreover, we have seen that the legislature had added new branches to the common law, and had increased the complexity of some of its existing branches.[4] Under these various influences the common law all through this period, maintained a vigorous life and a continuous growth. The vigour of that life and growth increased, with the increase of the prosperity of the country, in the latter part of the sixteenth century; and it was well maintained during the first half of the seventeenth century.

In this section I propose to give some account of the manner in which this life and growth of the common law was fostered by the common lawyers during this period, and to summarize the results of their work upon the law itself. The subject will fall under the following heads:—The Serjeants and the Judges; The Reporters; The Literature of the Common Law; The Condition of the Common Law.

### *The Serjeants and the Judges*

During the earlier part of this period the Serjeants and the Judges continued to be the recognized heads of the legal profession;[5] and we have seen that the memory of the old order lived on in the rule, which was not repealed till the Judicature Act of 1873, that the degree of Serjeant was a condition precedent to a seat on the bench.[6] But, from the middle of the sixteenth century, there are signs of a change in the position of the Serjeants. Though the degree of Serjeant was still a condition precedent for a seat on the bench, it was beginning to be conferred merely as a formal preliminary to a judicial appointment.

[1] Above 143-148. [2] Vol. iv 488-492.

[3] Above 21, 143; thus James Whitelocke (the future judge of the King's Bench) tells us that at Oxford he "began to joyne the study of the common law withe the civill, being encoraged mutche thearunto by a book set out by dr. Cosins, the dean of the arches, intituled, 'An apologye of the ecclesiastical proceedings,' in whiche I saw how great use he made of his knoledge of the common law to upholde the authority of his owne profession, and to direct others of his place," Liber Famelicus (C.S.) 14.

[4] Vol. iv Chap. ii.

[5] For the earlier history of the Serjeants see vol. ii 485-492.

[6] Vol. i 197; 36, 37 Victoria c. 66 § 8.



As early as 1545 Chief Baron Lyster was made a Serjeant, and, on the same day, Chief Justice of the King's Bench;[1] and in 1555 there is another instance of the same kind.[2] By the end of the sixteenth and the beginning of the seventeenth century it would seem that this was a recognized practice.[3] In 1799 the fact that it was only possible to create a Serjeant in term time was found to cause some inconvenience when it was desirable to fill up a vacancy immediately; and so it was enacted that the king could for this reason create a Serjeant in the vacation,[4] a power extended to the creation of a Serjeant for any other reason in 1826.[5] That the practice had come to be recognized at the beginning of the seventeenth century was no doubt due to the fact that it was then becoming customary to raise the Attorney and Solicitor-General to the bench. These offices could not be held by a Serjeant, and their acceptance by a Serjeant involved the resignation of his degree.[6] The fact, too, that these law officers of the crown were beginning to be regarded as the leaders of the Bar tended further to diminish the importance of the Serjeants;[7] and this tendency was strengthened by the rise at the end of this period of the new order of King's Counsel.[8] We shall see that in the following period these causes entirely altered the position of the Serjeants in the legal profession, and that they were not without some influence, both upon the composition of the Bench, and upon the older system of legal education.[9] As yet, however, these causes were only beginning to operate. The change from the old ordering of the legal profession to the new was as yet hardly perceptible.

As in the preceding period, most of the Serjeants and the Judges lived very similar lives. They continued to be somewhat of a close body; and, though in no way an hereditary caste, they naturally intermarried and brought up their children to their own profession. In the lists of judges and distinguished lawyers we find certain names constantly recurring. Some are well known outside the sphere of merely legal history. Roper[10] has told us how Sir

[1] Wriothesley's Chronicle (C.S.) i 161-162; Foss's statement, Judges v 526, that the earliest instance in which this occurred was 1574 cannot be supported.

[2] Dasent v 138.

[3] Egerton in 1603 wrote to James I.—"I thynke yt not amysse to put you in remembrance that the late Queene, consideringe that most of the Judges are aged, and the Serjeantes at Lawe now servinge at the barre not so sufficynt to supplye judiciall places as were to be wyshed, (*ne quid dicam durius,*) made choyse of certen persons of great learninge and sufficiencye fitte to be called to that degree," Egerton Papers (C.S.) 372; see Whitelocke's account of his own creation preparatory to his being made chief justice of Chester, Liber Fam. (C.S.) 77-84.

[4] 39 George III. c. 113; Foss, Judges viii 200.

[5] 6 George IV. c. 93; Foss, Judges ix 8.

[6] Vol. vi 464; Foss, Judges vi 32.

[7] Vol. vi 470-472.

[8] Ibid 472-476.

[9] Ibid 477-481.

[10] Life of Sir Thomas More.

Thomas More "whensoever he passed through Westminster Hall to his place in the Chancery by the court of King's Bench, if his father, one of the judges there, had been set ere he came, he would go into the same court, and there reverently kneeling down in the sight of them all, duly ask his father's blessing." Francis Bacon was the son of Lord Keeper Bacon.[1] Lord Chancellor Clarendon, the famous historian of the civil war, came of a family which, in the preceding generation, had produced an Attorney to the Queen of James I. and a chief justice of the King's Bench.[2]

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[3] Below 351.

[4] Foss, Judges vi 343-344.

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Still more distinguished was the family of the Finches.[4] Sir Thomas Finch, a soldier of some note, married Catherine Moyle—a family whose name is well known in the Year Books of Henry VI. and Edward IV.'s reigns. His second son was Henry Finch, serjeant-at-law, famous for his book on jurisprudence and the common law, to which Blackstone owed a considerable debt.[5] Henry Finch's son was Sir John Finch—the speaker who was held down in his chair in 1629, the chief justice who, in the *Case of Shipmoney*, gave the clearest and the most impolitic exposition of the principles of prerogative government,[6] the lord keeper who opened the Short Parliament and was impeached by the Long

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[3] Liber Famelicus (C.S.) 17; Foss, Judges vi 130-135; 293-297.

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Parliament, and one of the judges of the regicides. Sir Thomas Finch's eldest son, Sir Moyle Finch, was the father of Heneage Finch, Speaker of the House of Commons in 1625-1626. Heneage Finch's eldest son was Lord Chancellor Nottingham—the founder of our modern system of equity; and his second son was the leading counsel for the Seven Bishops.

No doubt the natural tendency of descendants to follow in their father's footsteps was strengthened by the legal atmosphere of these lawyers' homes. The sixteenth century was, as we have seen, the golden age of the educational system of the Inns of Court and Chancery. The preliminary training for the bar, the subsequent teaching incumbent on barristers and benchers, the large practice in courts new and old acquired by the leaders of the bar in this litigious age,[1] left the successful lawyer little leisure for anything but law. Clarendon tells us in his Life that "he grew so much in love with business and practice that he gave up his whole heart to it."[2] And doubtless this was true of many other lawyers. At the same time the education of many of these lawyers was not quite so severely professional as in the preceding period. It became customary for many (as at the present day) to start their career at the universities; and there is at least one instance in which a student kept his terms in London while still at the University. James Whitelocke tells us that, while in residence at St. John's College, Oxford, he "was admitted of the Middle Temple 2° Martii 1592, and kept in commons from that time, at all sutche times as he coulde have dayes, by ordinarye licence, by grace, or for furtheringe of the colledge businesse, to be absent from thence."[3] One or two illustrations will show that the memory of and gratitude for the lessons which they had learned at the University often remained after they had made their mark as lawyers.

Sir Robert Rede, judge of the King's Bench and chief justice of the Common Pleas in the reigns of Henry VII. and VIII., was a member of Magdalen Hall, in the University of Cambridge, and left money to found lectures in humanity, logic, and philosophy—a foundation which is now represented by the annual Rede

[1] The earnings of a fairly successful barrister can be seen from the Liber Famelicus of James Whitelocke; the editor has unfortunately not printed the entries relating to this matter, but he tells us, Introd. xiv, that Whitelocke's practice in his first term produced £5 3s. 8d., in his first year £39 3s. 7d., in 1604 £188 6s. 8d., in 1605 more than £200, in 1607 more than £300, in 1608 more than £400, in 1612 more than £500, in 1615 more than £600, in 1619, £622, in 1620, £600 4s. 1d.; no doubt leaders of the bar like Coke made a great deal more; and the earnings of the law officers were large; Bacon said the post of attorney-general was worth £6000 a year, Spedding, Letters and Life of Bacon v 242; and this is not incredible seeing the sums which were offered or paid for it in Charles I.'s reign, below 353-354.

[2] Life (ed. 1842) p. 933.

[3] Liber Famelicus (C.S.) 14.



Lecture.[1] Maitland's Rede lecture[2] illustrated, in a manner which would certainly have delighted and as certainly astonished the learned founder, the results which could be attained by the application of humanity, logic, and philosophy to the history of the law. Coke was a member of Trinity College, Cambridge; and, in *Bonham's Case*, he went out of his way to praise his own and Oxford University—"Academiæ Cantabrigiæ et Oxoniae sunt Athenæ nostræ nobilissimæ, regni soles, oculi et animi regni, unde religio, humanitas, et doctrina in omnes regni partes uberrime diffunduntur."[3] Littleton was a member of Christ Church; and Clarendon tells us that he "had taken pains in the hardest and most knotty points of the law, as well as that which was more customary; and was not only very ready and expert in the books, but exceedingly versed in records, in studying and examining whereof he had kept Mr. Selden company, with whom he had great friendship, and had much assisted him; so that he was looked upon as the best antiquary of the profession, who gave himself up to practice."[4] Mr. Justice Dodderidge[5] was a B.A. of Exeter College, a member of the Society of Antiquaries, and a writer of books not only upon English law, but also upon topics of history and ecclesiastical law, which fell outside the ordinary run of a legal practitioner's knowledge.[6] James Whitelocke, a judge of the court of King's Bench, was one of Mulcaster's pupils at Merchant Taylor's school, and a member of St. John's College, Oxford.[7] At Oxford he studied the civil law, and was presented for the degree of B.C.L. by Albericus Gentili.[8] His son tells us that he kept up his knowledge, not only of Greek, but also of Hebrew—a language with which Merchant Taylors and St. John's still maintain an hereditary connection; and that, "he had the Latin tongue so perfect, that sitting judge of assize at Oxford, when some foreignors, persons of quality, being there, and coming to the court to see the manner of our proceedings in matters of justice, he caused them to sit down, and briefly repeated the heads of his charge to the grand jury in good and elegant Latin, and thereby informed the strangers and the scholars of the ability of our judges, and the course of our proceedings in matters of law and justice."[9]

[1] Dict. Nat. Biog.

[2] English Law and the Renaissance.

[3] 8 Co. Rep. at f. 116b.

[4] History of the Rebellion 228.

[5] Dict. Nat. Biog.

[6] Above 15; below 391-392, 397-398; Croke (Cro. Car. 127) spoke of him as "a man of great knowledge, as well in the common law as in other humane sciences, and divinity."

[7] "I was brought up at school under Mr. Mulcaster, in the famous school of the Marchantaylors in London, whear I continued untill I was well instructed in the Hebrew, Greek, and Latin tongs. . . . I was elected from the school to be probationer of St. John's Colledge in Oxon, 11 Junii, 1588, mr. Francis Willis being then president of the colledge," Liber Famelicus (C.S.) 12.

[8] Ibid 14.

[9] Memorials (ed. 1853) i 50.

On the whole the distinguished lawyers and judges of this period were better educated men than their predecessors in the fourteenth and fifteenth centuries; and this was, no doubt, one of the main reasons why the common law showed so many signs of improvement and so marked a capacity for expansion. Those who administered it were not wholly untouched by the new learning. They could therefore in some degree emancipate their minds from barren technicalities, and appreciate the large changes which were taking place in all spheres of the national life.

The strict technical training which was given by the Inns of Court, and the high ideals which they set before their students, ensured the professional competency of the Bench, and a high standard of professional honour in both Bar and Bench. All through the sixteenth century there was an abundance of good men at the Bar; and good judicial appointments were made. As a result the respect both of the king and of the people for the common law was in no way diminished.[1] There is only one doubtful instance in Elizabeth's reign of the dismissal of any judge for political reasons;[2] and all through the sixteenth century there are very few instances in which a judge was proved to be guilty of bribery or other unprofessional conduct.[3] No doubt it may be said with truth that the judges were under no temptation to take bribes. We have seen that, though their salaries were small, their fees added to their salaries gave them a very adequate income; and that, in the case of the chief justices, the value of the offices which were in their gift made their remuneration much more than adequate.[4] But we have seen that the standard of public morality in other branches of the civil service, and even in a branch of it so closely connected with the law as the Chancery, was by no means high.[5] On the whole in this, as in the preceding period, the standard maintained by the judges

[1] What Clarendon says upon this matter, History of the Rebellion 29, is very true—"It is very observable, that in the wisdom of former times, when the prerogative went highest, (as very often it hath been swoln above any pitch we have seen it at in our times) never any court of law, very seldom any judge, or lawyer of reputation, was called upon to assist in an act of power; the crown well knowing the moment of keeping those the objects of reverence and veneration with the people; and that though it might sometimes make sallies upon them by the prerogative, yet the law would keep the people from any invasion of it, and that the king could never suffer, whilst the law and the judges were looked upon by the subject, as the asyla for their liberties and security."

[2] Robert Monson, Foss, Judges v 527-528; cp. Gardiner, History of England ii 7-8.

[3] Roger Manwood, Foss, Judges v 520-522, vol. i 505; the judges of the other courts have not quite such a good record; charges of bribery were proved against John Beaumont M.R. in 1550, Foss, Judges v 290, 291; Francis Bacon L.C., and Benet, the judge of the Prerogative Court; the last named escaped condemnation on his impeachment by the dissolution of Parliament, but was condemned and fined for his offences by the Star Chamber, Gardiner op. cit. iv 350.

[4] Vol. i 252-255, 257-259.

[5] Above 244-245.



and the legal profession was above the average. "Cast thine eye," said Coke,[1] "upon the sages of the law that have been before thee and never shall thou find any that hath excelled in the knowledge of these laws but hath plucked from the breasts of that divine knowledge, honesty, gravity, and integrity. . . . For hitherto I never saw any man of a loose and lawless life attain to any sound and perfect knowledge of the said laws: and on the other side I never saw any man of excellent judgment in these laws, but was withal . . . honest fruitful and virtuous." There was more truth in this eloquent panegyric than is usual in such compositions.

The Bench, too, in the sixteenth century worthily upheld the independence of the law. No doubt the control of the Council was strict,[2] no doubt the Council often did things which later ages have no difficulty in denouncing as unconstitutional;[3] but we have seen that its action was in that age generally approved as necessary for the safety of the state;[4] and it should be remembered that the Council in the sixteenth century was careful not to draw the judges into discussions as to the legality of doubtful exercises of its authority.[5] No doubt the manner in which some of the state trials of this period were conducted has led historians to criticize severely the conduct of the judges. But, as we have seen, it was not an age in which the supremacy of the state was so well assured that it could afford to be lenient.[6] This severity was generally considered to be necessary for the maintenance of its security; nor are we in a position to say that this belief was unfounded. On the whole the Council and the judges worked together harmoniously, and with popular approval, at the task of maintaining order and administering justice in these troubled times. On circuit the judges were quick to detect and expose cases of oppression. Dyer efficiently protected a poor widow against the partiality of the whole bench of justices of Warwickshire, and successfully defended his action when complaint was made to the Council.[7] Whitelocke tells us how Williams and Yelverton, when acting as judges of assize, dealt with his adversary Sir William Pope, who was guilty of maintaining by force a claim to property in defiance of the award of the arbitrators, to which they had both submitted.[8] If the

[1] 2 Co. Rep. Pref. x, xi.

[2] Vol. iv 83-87

[3] Ibid 87, 105.

[4] Ibid 106, 190.

[5] Above 346 n. 1; vol. iv 190.

[6] Above 189-190.

[7] Foss, Judges v 483, 484; see the text of Dyer's answer printed in Vaillant's life prefixed to his English translation and corrected edition of Dyer's reports.

[8] Liber Famelicus (C.S.) 22—"I remember when he arrose up in his place upon the benche, making accoumpt to answear the accusation, thear as he stood, he was commanded by the court to go to the bar, and justice Yelverton told him he was

Council sometimes appears to us to encroach upon the independence of the Bench, we should do well to remember that it always professed and generally showed great respect to the law;[1] that it consulted the judges when the law appeared to be at all doubtful; and that it generally acted upon their opinions.

Nor are instances wanting in which the judges asserted and maintained as against the Council their right to interpret the law freely and independently. They so acted, not only when the crown sought to encroach upon their emoluments by attempting to appoint to offices within their gift,[2] but also in defence of the liberty of the subject. In 1550 Lyster, Bromley, and Portman J.J. appeared before the Council and justified a refusal to stay process in a case of praemunire, on the ground that, "thei were sworen to suffer the lawes to have their due courses, so that withoute violatinge of their othes thei could staye no proces."[3] In 1591 the opinion of all the judges upon commitments by the Council contained at once a protest against causeless detention, and a statement of law for the future, which was meant to limit the discretion of the Council.[4] Nor were they slow to maintain the dignity of their courts. Most persons have heard of the fate of the condemned criminal who "ject un Brickbat a le justice que narrowly mist;"[5] and Manningham tells us how "Upon a tyme when the late Lord Treasurer, Sir William Cecile, came before Justice Dyer in the Common Place with his rapier by his side, the Justice told him that he must lay aside his long penknife if he would come into that Court."[6]

It was but rarely that any unusual event disturbed the routine of the courts at Westminster or on circuit. We get, it is true, echoes of the great events passing in the outside world in the cases which came before the courts; but these events rarely affected them in any other way. Occasionally, however, they broke the ordinary routine of business. In 1517, after the Evil May Day, "the Kinge satt in the Kinge's Benche in Westminster Hall, and there was brought before him all the prisoners, which came from the Tower of London in their shirtes with

fitter to leade the rebells in Northampton (whiche lately before had been in commotion) than to sit thear as a justice of peace. Thear was great speaking and talking over all the countrye, of this noble and stout peece of justice."

[1] Vol. iv 274-275. [2] Vol. i 261.

[3] Dasent iii 159, 160; in 1616 Chamberlain noted that Warburton J. was in disgrace for hanging a Scotch falconer of the king contrary to his command, S.P. Dom. 1611-1618, 398, lxxxviii 12.

[4] Vol. i 509; vol. iv. 87; above 191; vol. vi 32-34; Prothero, Documents 446-448 gives from the Lansdowne MSS. lxviii 87 the authentic version to which the autograph signatures of the judges are attached; an imperfect version is given 1 And. 297-298; for the two versions see App. I.

[5] (1631) Dyer 188b note. [6] Manningham's Diary (C.S.) 36.



halters about their neckes, and there the king pardoned them."[1] By reason of the fear caused by Wyatt's rebellion, on Candlemas day 1553-1554 and on other days, "the justices, serjeantes at the law, and other lawyers in Westminster Hall, pleaded in harnesse."[2] On one occasion Chief Justice Anderson, while on circuit, took a sword to help stop a fray which had begun in his presence.[3] We have seen that on two other occasions it seemed likely that the judges of the court of Common Pleas would be obliged to preside at the species of fray still recognized by law—trial by battle.[4] Several times during this period outbreaks of the plague made it necessary to adjourn the term. In 1625 Whitelocke tells us how, "when the plague was somewhat assuaged and there died in London but 2500 in a week," his father was obliged to go to Westminster to adjourn the Michælmas Term to Reading; he tells how he came to Hyde Park and dined on the ground on such food as they had brought, "and afterwards he drove fast through the streets, which were empty of people and overgrown with grass to Westminster Hall; where the officers were ready, and the judge and his company went straight to the King's Bench, adjourned the court, returned to his coach, and drove away presently out of town."[5] In 1629 the spring tide flooded Westminster Hall, so "that neither the serjeants could come to the bar, nor any stand in the Hall, for there was a boat that rowed up and down there."[6]

Similarly the judges in the sixteenth century were very little affected by the political and religious changes of the period. The two chief justices, Cholmley and Mountague, lost their places on the accession of Mary for the part which they had taken in the attempt to disturb the order of the succession to the throne.[7] And, at the beginning of the same reign, Hales, a judge of the Common Pleas, was imprisoned, and induced by threats to recant his Protestant principles. But this recantation so preyed upon his mind that he committed suicide by drowning himself; and his suicide gave rise to two reported cases,[8] which in their turn are supposed to have given rise to the reasoning which Shakespeare put into the mouth of the grave-diggers in a famous scene in Hamlet.[9] Except in these cases, the political and religious changes of the sixteenth century left very slight

[1] Wriothesley's Chronical (C.S.) 11.

[2] Stow, Annals (Ed. Howes 1631) 619.

[3] Manningham's Diary (C.S.) 41. [4] Vol. i 310.

[5] Whitelocke's Memorials i 5. [6] Hutton's Rep. 108.

[7] Foss, Judges v 343, 344.

[8] Bishop of Chichester v. Webb (1554) 2 Dyer 108; Hales v. Petit (1561) Plowden 253-265.

[9] Foss, Judges v 373-374.

traces upon the constitution of the Bench. No doubt most of the judges were willing, like the majority of the nation, to conform silently to the religion of the reign. Unlike Hales, they did not attract notice by pointedly calling attention to laws which were in opposition to it. They were therefore subjected to no searching questions by either side. At any rate it is clear that Elizabeth on her accession renewed the patents of all her sister's judges; and several undoubted Papists retained their seats on the Bench for the rest of their lives.[1] We cannot doubt but that the position which the judges thus occupied outside political controversy, coupled with their just reputation for learning and uprightness, led to a respect for their rulings and decisions which helped in no small degree the peaceful government of the state.

All this was changed in the first half of the seventeenth century. The constitutional conflict divided the nation into two camps; and it was hardly to be expected that the king would allow his political opponents to retain their seats on the bench. The debatable questions of constitutional law which divided the nation were often so very debatable, that it was impossible to suppose that a lawyer's view of the law was not consciously or unconsciously swayed by political considerations.[2] Both Bar and Bench soon felt the effects of the conflict. Counsel who ventured to question the acts of the government were persecuted by courts which were more closely identified with the government than the common law courts. Fuller, who had applied for a prohibition against the court of High Commission, was prosecuted by that court, nominally for schism.[3] Whitelocke, who had opposed the king's power to levy impositions in 1610, "was taunted and checked" by Ellesmere when he appeared to argue a case in the court of Chancery, and was imprisoned by the Council for venturing to dispute on behalf of his client the legality of the earl Marshal's court.[4] Even a reading in the Middle Temple upon a statute of Edward III.'s reign,[5] which touched upon the jurisdiction of the common law courts in ecclesiastical cases, was stopped because it bore upon present politics.[6]

[1] Shortly after Elizabeth's accession Saunders, Chief Justice of the Queen's Bench, became Chief Baron of the Exchequer, and Browne, Chief Justice of the Common Pleas, became a puisne judge of the Common Pleas—in both cases the judges thus changed to less important positions were Roman Catholics, Foss, Judges v 406-407.

[2] Vol. vi 29-30

[3] Below 429.

[4] Liber Famelicus (C.S.) 33-40; for the abuses of this court see vol. i 580; Life of Clarendon 934-935.

[5] 25 Edward III. St. 3 c. 7.

[6] Whitelocke, Memorials i 95-97; for an account of this reading, which was by Edmund Bagshaw, see S.P. Dom. 1639-1640 522-524, ccccxlvii 33; it is recorded that "the reader went out of town escorted by 40 or 50 horsemen in very good credit and applause of the house of which he is a member."



Judges were frequently dismissed for political reasons. Coke heads the list in 1616.[1] Then followed Chief Justices Crew[2] and Heath[3] in 1626 and 1634. Chief Baron Walter was suspended in 1630, and was not dismissed only because, as was often the case with the Barons of the Exchequer, he had been appointed "quamdiu se bene gesserit."[4] Pressure was put upon them to delay justice in cases in which the government was interested—the *Case of Commendams* is, as we shall see, a striking example.[5] With increasing frequency they were asked to give extra-judicial opinions upon pending cases, or upon political questions which were likely to give rise to decisions interesting to the government. Illustrations are to be found in *Peacham's Case*,[6] and in the questions addressed to them as to the effect of the passing of the Petition of Right upon the crown's power to commit to prison,[7] as to the extent of Parliamentary privilege,[8] and as to the legality of ship money.[9] It is true that the action of the crown in thus consulting the judges was at that time regarded as legal.[10] But when a king, who could and did dismiss judges for political reasons, constantly put these questions to them, they were obviously exposed to the constant temptation of giving the answer known to be wanted. The climax was reached in 1637, when the king promulgated their opinion as to the legality of ship money, and required all of them to append their signatures, in order to stop litigation as to its legality.[11]

[1] Below 440-441.

[2] Gardiner, History of England vi 149.

[3] Ibid vii 361—"It is probable, though not a word of evidence exists, that Charles had reason to think that he was not sound on the question of ship money"; see S.P. Dom. 1634-1635 xiv for his humble, but unsuccessful petition to Charles not to dismiss him; even after his dismissal he clearly hoped to regain court favour, ibid 289 cclxxvii 37; 453 cclxxxii 16.

[4] Ibid vii 112-114; cp. S.P. Dom. 1629-1631 76, 77-78, cl 47, 58.

[5] Below 439-440.

[6] Below 438.

[7] Bramston, Autobiography (C.S.) 48, 49, gives the questions from a report of Hyde C.J.; cp. Gardiner, op. cit. vi 294-296.

[8] It appears from Bramston's Autobiography (C.S.) 49-54 that (1) the king on March 3, 1628-1629, put certain questions to the two chief justices and the chief baron; it is these questions that are reproduced in Nalson's Collections ii 374; and (2) that in April he put another set of questions to all the judges and Barons of the Exchequer; it is these questions that are reproduced in 3 S.T. 235-238, and in Rushworth i 672-674; Bramston's account of the contents of the questions would seem to be the most accurate as he said that he had it from Hyde's own report.

[9] See Gardiner, op. cit. viii 94 for the opinion of 1635; to this opinion Croke did not wholly assent, and Hutton did not sign it.

[10] Below 428 n. 1, 438.

[11] See the text of this document in Gardiner, op. cit. viii 206-208; as Gardiner says, ibid. 207—"Hitherto, whenever the crown had asked the opinion of the judges, it had asked that opinion, at least ostensibly, to enable it to shape its course according to law. Charles now openly asked them to promulgate that opinion, which he had received from them a year before, not to enlighten himself, but to hinder his subjects from arguing the question in Westminster Hall"; Whitelocke, Memorials i 71, says that Finch C.J. resorted to bribes and threats to get the signatures of the judges; and there is some evidence that Bramston as well as Hutton and Croke

It is true that the judges sometimes plucked up the courage to act independently. They refused to answer all Charles I.'s questions as to the legal consequences of his assent to the Petition of Right,[1] and as to the extent of Parliamentary privilege,[2] because some of the matters raised by these questions were likely to come before them judicially—though they hinted that they agreed with the view which the king wished them to take. We have seen that they stated clearly that torture was illegal by the common law.[3] In 1632 Chief Justice Richardson refused to obey the orders of the government to see that the justices of the peace suppressed wakes on Sundays; and in consequence he was soundly rated by Laud.[4] In 1631 the judges refused to delay an action for false imprisonment brought against certain members of the court of High Commission, and proceeded to hear it, in spite of the express command of the king given by himself in person.[5] But, in the years of prerogative government which followed upon the dissolution of Parliament in 1629, they gradually and inevitably tended to become identified with the party and the policy of the king.[6] They became, Clarendon tells us, as sharp sighted as secretaries of state in the mysteries of state, and in courts of law apothegms of state were urged as elements of law.[7] Thus they tended to become merely the civil servants of the king, and not the independent expositors of the law that they had been in the Tudor period. And, as they sank to this position, so their appointments tended, like that of other civil servants in the Stuart period, to be made dependent upon court influence, and even upon bribery and other forms of corruption.

only subscribed because they were told it was usual to put their signatures to what the majority had agreed, Bramston, Autobiography (C.S.) 68, 79, 80.

[1] Gardiner, op. cit. vi 295-296.

[2] Bramston, Autobiography (C.S.) 53-54—the attorney-general read a speech of Sir John Eliot's and asked the judges if it was censurable; they replied, "they desire to be spared to give any answer to a particular case which might peradventure come before them judicially; but they all disliked manie parts of the speech, and did conceave it to be not accordinge to a parliamentarie proceedinge."

[3] Above 185.

[4] Whitelocke, Mem. i 17; Foss, Judges vi 361; in 1628 he had been in trouble because he was accused of granting a Prohibition contrary to the wishes of the king, and he had written to assure the king the accusation was unjust, S.P. Dom. 1628-1629 361, cxix 39; see ibid 380, cxx 65 for another order of the king not to grant a Prohibition.

[5] Whitelocke's Memorials i 44, 45.

[6] Gardiner, op. cit. vii 123, 361—"They never ventured to regard themselves as arbiters between the crown and the nation. They accepted in the fullest sense the position of defenders of the prerogative. . . . They were well pleased that the Government should go its own way if only it flattered them by referring the legality of its action to the metewand of their learning."

[7] History of the Rebellion 29; cp. Selden, Table Talk 95—"The king's oath is not security enough for our property, for he swears to govern according to law; now the judges they interpret the law; and what judges can be made to do we know."



The Serjeants habitually paid for their degree. In 1614 Whitelocke notes that each of the newly made Serjeants had given £600 to the king;[1] and that George Croke was left out because he refused to give it.[2] The judges sometimes gave money to the king or to the reigning favourite. It is probable that the gift to Buckingham's nominee of the post of clerk of the King's Bench was the price which Mountague paid for the post of Chief Justice of the King's Bench, when Coke was dismissed in 1616.[3] There were rumours that Richardson gave money for his post of Chief Justice in 1626, and Vernon for his post of Baron of the Exchequer in 1627.[4] It is quite certain that the Mastership of the Rolls was sold to Sir Charles Cæsar in 1639.[5] The prevailing corruption is strikingly illustrated by the curious tale which Henry Yelverton told Whitelocke as to his own appointment to the post of attorney-general.[6] Yelverton was warned that unless he conciliated Buckingham he would run a risk of losing the place. But, in spite of this warning, Yelverton refused to approach the duke. Then Buckingham sent for him and told him that he did not mean to oppose his appointment, though Sir James Lea had offered him £10,000 for the post; but that he expected to be approached that the world might think that he had had some share in the appointment. He then took the warrant under which Yelverton was to be appointed, and got the king's signature to it. Yelverton therefore got his post without paying for it. "But when the businesse was done, and no expectation of anything he went privately to the king, and told him he did acknowledge how like a good master and worthye prince he had dealte with him, and, althoughe ther was never mention, speeche, or expectation, of anything to be had for his having of this place . . . yet . . . he wolde give him 4000*l.* readye money. The king toke him in his armes, thanked

[1] Liber Famelicus (C.S.) 44—"It is not to be forgotten that the Serjeants-at-Law gave eache of them 600*l.* to the king, and sum of them were not worthe the money, and sum never likely to see it halfe againe in thear practise"; in Trinity term 1623 they gave £500, Bramston, Autobiography (C.S.) 6, 7; S.P. Dom. 1619-1623 623, cxlvii 80; in 1624 it was said that there was some one prepared to give 1000 marks for the place of king's serjeant, ibid 1623-1625 356, clxxiii 54; in the same year Zouche wrote that the making of serjeants for money was complained of in the House of Commons "by the greatest lawyer in the House," ibid 257, clxv 48.

[2] Liber Famelicus (C.S.) 44.

[3] Foss, Judges vi 169; Liber Famelicus (C.S.) 59; there were also rumours that he had given £15,000 for the place, Yonge's Diary (C.S.) 29; for that office and its value see vol. i 257-258.

[4] Yonge's Diary (C.S.) 97, 98; Liber Famelicus (C.S.) 108; Foss, Judges vi 369.

[5] Ibid 273; cp. S.P. Dom. xxvi-xxvii.

[6] Liber Famelicus (C.S.) 55-57; in 1620 Chamberlain wrote that large sums were offered for the attorney-general's place, "which in this golden age will probably be accepted," S.P. Dom. 1619-1623, 157, cxvi 112.

him, and commended him mutche for it, and tolde him he had need of it, for it must serve even to buy him dishes, and bad him pay it to his servant Murrey, which he did, and shewed me the acquittances for it."

The result, as Clarendon points out, was to bring both the judges and the law into contempt; and this result contributed in no slight degree to the excesses committed by the Long Parliament.[1] The judges, who had shown no mercy to those who opposed prerogative government, got none when its opponents came into power.[2] Jenkins, the Welsh judge who wrote the Eight Centuries of Reports,[3] was a firm royalist; and, in his preface he tells us how, "amidst the sound of drums and trumpets, surrounded with an odious multitude of barbarians, broken with old age and confined in prisons, where my fellow subjects wild with rage detained me for fifteen years together, he bestowed his watchful hours upon this performance." Clarendon blamed the government for making the judges their assistants in the carrying out of their policy, and contrasted it with the policy of the Tudors.[4] But in truth it is difficult to see what else the government could have done. We shall see that the constitutional questions as to the extent of the prerogative, and as to its relation to the law, were treated by the Parliamentary opposition as legal questions to be answered by an appeal to the law.[5] Both the Parliament, and the public opinion which backed it, made it necessary to submit these questions to the arbitrament of the law; and the government consequently did what they could to secure a verdict favourable to themselves. We have seen that in the Middle Ages the judges sometimes found themselves involved in politics when the political questions which divided the state assumed a legal aspect.[6] It was hardly possible that they should not have been involved in politics, when the great

[1] History of the Rebellion 29—"And here the damage and mischief cannot be expressed, that the crown and state sustained by the deserved reproach and infamy that attended the judges, by being made use of in this and the like acts of power; there being no possibility to preserve the dignity, reverence, and estimation of the laws themselves, but by the integrity and innocency of the judges. And no question, as the exorbitancy of the house of commons this parliament hath proceeded principally from their contempt of the laws, and that contempt from the scandal of that judgment [The Case of Shipmoney]; " the peers never consulted them as in past times, "thinking it a just reproach upon them (who out of their gentilesses had submitted the difficulties and mysteries of the law to be measured by the standard of general reason, and explained by the wisdom of the state) to see those men make use of the licence they had taught, and determine that to be law, which they thought reasonable, or found to be convenient"; in S.P. Dom. 1629-1631 423 there is a paper by Heath, the attorney-general, which states that the judges "have of late been much undervalued."

[2] Vol. vi 111.

[3] Below 362; cp. Wallace, The Reporters 69-72.

[4] Vol. ii 560.

[5] Vol. vi 103, 106-107.



political questions which divided the nation were regarded by both parties as questions to be answered by an appeal to the law.

Both the political events of the seventeenth century and the corruption of the court influenced for the worse the quality of the Bench. But these influences naturally took time to produce their full effect. In the earlier part of the century the older system of legal education and the older traditions still lived on. The judges appointed had been educated under the old system. They were learned men and administered the law fairly as between party and party;[1] and, as we have seen, they occasionally ventured to oppose the wishes of the Government.[2] We shall see that after the Great Rebellion the old system of legal education disappeared,[3] and that the outstanding political questions of the day still continued to influence the selection of the judges.[4] The result was that the deterioration in the character and learning of the Bench became more apparent. No doubt upright and learned men still found a place there; but it was not till after the Revolution had settled the political questions at issue in the seventeenth century, and restored security of tenure to the judges, that the Bench as a whole attained the standard which it had reached in the sixteenth century.

But we must now turn to the history of those judges and lawyers whose names are still familiar to us, because, in the Reports which they wrote or edited, they have made that permanent record of the life work of themselves and their companions, to which we still appeal for authoritative information as to the growth and contents of the principles of the modern common law.

### *The Reporters*

In the sixteenth century we pass from the period of the anonymous Year Books, to the period of Reports written by, or ascribed to, named authors, most of whom were eminent judges or practitioners. There are some forty sets of reports, containing cases decided before and during this period, which were either written and published contemporaneously, or published after its close. It would be obviously impossible to describe all these reports separately and in detail. Nor would this be necessary, as Mr. Wallace in his book on the Reporters has given us a very adequate description.[5] I shall therefore only set

[1] Gardiner, op. cit. vii 361—"As far as the administration of justice between man and man was concerned they stand in no need of defence. There were no takers of bribes amongst them. They were never charged with incapacity or negligence."

[2] Above 352.

[3] Vol. vi 481-499.

[4] Ibid 502-511.

[5] J. W. Wallace, The Reporters arranged and characterized. Fourth Ed. by F. F. Heard.

out in tabular form the list of the reports of this period, together with their chief characteristics. Then I shall endeavour to state shortly the points in which these reports resemble, and the points in which they differ from the Year Books on the one hand, and from their successors of the eighteenth and nineteenth centuries on the other. Lastly I shall say something of the epitomes and indexes to these reports which soon began to appear, and of Rolle's Abridgment—the earliest of the Abridgments which summarize the contents of the modern reports, the successor to those Abridgments of the Year Books which have been already described,[1] and the precursor of a new stage in the history of these Abridgments.

In the following Table I have arranged the reports of this period in the chronological order of their publication.[2] I have included in this list many reports which were published in the latter half of the seventeenth century, because they contain cases decided in this period, or during the period of the Commonwealth. The Table shows that we cannot as yet divide the reports very accurately according to the courts in which the cases reported were decided Many of them contain cases decided in all the common law courts; and some of them contain cases decided in the court of Star Chamber, in the court of Wards and Liveries, and occasionally even in the court of Chancery. The state of the reports thus illustrates what I have said above as to the penetration of the common lawyers into some of the courts outside the sphere of common law jurisdiction.[3] When they penetrated into these courts they naturally introduced their habit of reporting the cases there decided. There can be little doubt but that if the Star Chamber and the court of Wards had had a longer life, we should have had a series of reports of their doings, similar to the series of reports of the doings of the common law courts and the Chancery.[4] It is clear also from the Table that some of these reports were published by their authors; that others were published after, and, in some cases, long after their authors' death; and that, in many cases, no sufficient account is given of the MS. from which they were published. We shall see that all these are circumstances very material to be considered in estimating the authority which is or should be attached to these reports in our modern law. Finally, the fact that most of these reports were, except during the period of the Commonwealth, written in the first instance in law French, illustrates the

[1] Vol. ii 543-545.

[2] The only deviation from the chronological order which I have made is in putting the last two parts of Coke's Reports with the first eleven parts; for these reports see below 461-465.

[3] Vol. iv 270-272.

[4] Above 163.



long life of this language in the law;[1] while the dates at which some of them were translated give us a very accurate idea as to when the lawyers really ceased to think in and write this peculiar tongue. With these introductory remarks I shall let the Table (see pp. 358-363) speak for itself.

If it were true that the Year Books were official publications, it is clear that there would be little in common between them, and these collections of cases, privately reported and separately published. But, as it can now be taken as certain that the Year Books were not official publications,[2] the transition from them to these reports loses much of its abruptness. And in fact, although there are great differences between the reports of this period and the Year Books, there are also strong resemblances; and these resemblances are the more striking in some of the earlier reports than in the later. I think that these resemblances, which I shall now describe, create at least a presumption that the later Year Books, like the earlier, owed their origin, not to official action, but to the needs and energies of the legal profession. We shall see that the differences, which in the course of this period begin to emerge, can be accounted for, partly by the different conditions of publication which the introduction of printing involved, partly by changes in legal procedure, and partly by the hardening of the view of the common lawyers as to the binding force of decided cases. And, in this connection, it is important to remember that there is a certain amount of continuity in the organization of the trades associated with the production of books before and after the introduction of printing. The older association of writers of text letters and limners became the craft of the Stationers, and, on the introduction of printing, joined with the printers, and became the company of Stationers.[3] It is therefore a probable inference that, in the particular case of the production and publication of law reports, though there were changes, there was no entire break between the period of the Year Books and the period of the reports.

The reports of this period resemble the Year Books (i) in the manner in which most of them originated; (ii) in the circumstances under which many of them were published; (iii) in the existence of MS. authority far more authentic than that upon

[1] The Reports published during the Commonwealth were published in English in accordance with the legislation of the Commonwealth, vol. vi 424; but this was an interlude; at the Restoration there was a reversion to French—indeed Style, who reported cases in the upper Bench, is very dubious as to the value of these English reports, see Preface to his Reports.

[2] Vol. ii 532-536; vol. iv 262.

[3] Vol. vi 362-363.

TABLE SHOWING THE REPORTS OF THE SIXTEENTH AND FIRST HALF OF THE SEVENTEENTH CENTURIES

| Name. | Date of First Publication. | Date of Author. | Period over which Reports Extend. | Courts in which Cases are Reported. | By whom Published and Edited. | Origin of MS. | Language in which First Published. |
|---|---|---|---|---|---|---|---|
| Plowden . . | Pt. I., 1571 Both Pts., 1578 | 1518-1585 | 1549-1580 | K.B.; C.P.; Ex. | The author. | From his own MS. | French. Tr. 1761. |
| Brooke (New Cases) | 1578 | Died 1558 | 1515-1558 | K.B.; C.P.; Ex.; Ch.; and other courts; conferences of the judges and others; resolutions in Parliament. | Bellewe. | Taken from Brooke's. Abridgment by the editor. | French. Tr. by March, 1651; the cases being arranged alphabetically, not chronologically, as in the original. |
| Bellewe . . | 1585 | Not known exactly | 1378-1400 | K.B.; C.P. | Bellewe. | Taken from the cases abridged from the Y.BB. of Rich. II., by Statham, Fitzherbert, and Brooke. | French. |
| Dyer . . | 1585 | 1512-1582 | 1513-1582 | K.B.; C.P.; Ex.; Ch. | R. Farewell and J. Dyer. | From Dyer's own MS., left by him to his nephews—Farewell and Dyer. | French. Tr. and edited by Vaillant, 1794. |



| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Coke [Pts. I.-XI.] | 1600-1615 | 1552-1634 | 1572-1616 | K.B.; C.P.; Ex.; Ch.; Star Chamber; Ct. of Wards. | The author. | From his own MS. | French. Tr. 1658, without the pleadings; the pleadings tr. and published separately, 1659. |
| ,, [Pts. XII. and XIII.] | Pt. XII., 1656 ,, XIII., 1659 | — | 1582-1613 | K.B.; C.P.; Ch.; Star Chamber; Ct. of Wards; High Commission; Misc. memoranda. | Pt. XII. anon. The preface to Pt. XIII. is signed I.G. | From Coke's MSS. | English. Tr. from Coke's MSS., by the editors. |
| Keilway . . | 1602 | 1497-1581 | 1496-1531, with some cases incerti temporis and some of Ed. III.'s reign. | K.B. and C.P. | John Croke. | Selected by the editor from the author's papers. | French. |
| Davis . . | 1615 | 1570-1626 | 1604-1612 | K.B. and Ex. of Ireland. | The author. | From his MS. | French. Tr. 1762. |
| Hobart . . | 1641 | ? -1625 | 1603-1625, with some cases of Elizabeth's reign. | K.B.; C.P.; Star Chamber. | By an anonymous editor; revised and corrected by Lord Nottingham. | From the author's MS. | English. |
| Special Law Cases | 1641 | Unknown | Cases Henry VII. - Eliz. stated summarily. | K.B. and C.P. | M. F. Perused corrected and enlarged by Sir R. Hutton. | Unknown. | English. |
| March, New Cases | 1648 | 1612-1657 | 1639-1643 | K.B. and C.P. | The author. | The author's MS. | English. |

TABLE SHOWING THE REPORTS OF THE SIXTEENTH AND FIRST HALF OF THE SEVENTEENTH CENTURIES

| Name. | Date of First Publication. | Date of Author. | Period over which Reports Extend. | Courts in which Cases are Reported. | By whom Published and Edited. | Origin of MS. | Language in which First Published. |
|---|---|---|---|---|---|---|---|
| Clayton . . | 1651 | Unknown | 1631-1651 | Assizes held at York. | The author. | The author's MS. | English. |
| Brownlow and Gouldesborough | Pt. I. by both authors, 1651; Pt. II., by Brownlow, 1652 | Brownlow 1553-1638 Gouldesborough unknown. | 1569-1625 | C.P. | Pt. I. an anonymous editor; Pt. II. R.M., barrister. | No account. | English. |
| Bridgman (Sir John) | 1652 | Unknown | 1613-1621 | C.P. | Edited by J.H. | Said by the editor to be in Bridgman's hands. | Translated from French by the editor. |
| Godbolt . . | 1653 | ? -1648 | 1575-1638 | K.B; C.P.; Star Chamber. | Edited by W. Hughes. | No account given. | English. |
| Gouldesborough | 1653 | Unknown | 1586-1602 | K.B.; C.P.; Ch. | Edited by W.S. | From MS. "carefully transcribed by the author." | English. |
| Calthorpe . | 1655 | 1586-1637 | 1609-1618 | Cases concerning customs and liberties of London. | The author. | The author's MS. | English. |
| Hutton . . | 1656 | 1560-1638-9 | 1612-1639 | C.P. | An anonymous editor. | Translated from the author's MS. | Translated from French by the editor. |
| Noy . . . | 1656 | 1577-1634 | 1559-1649 | K.B.; C.P. | An anonymous editor. | No satisfactory account. The book may be an imposture or an imperfect abridgment of Noy's note book. | Translated from French by the editor. |
| Owen . . | 1656 | ? -1598 | 1556-1615 | K.B.; C.P. | An anonymous editor, who has obviously included cases from other sources. | No satisfactory account. | English, from unpublished French original. |
| Popham . . | 1656 | 1531 ?-1607 | 1592-1597, followed by cases reported by others, 1618-1627. | K.B.; C.P.; Ch. | An anonymous editor. | From the library of a serjeant, and said to be in Popham's handwriting. | English, from unpublished French original. |
| Bulstrode . . | Pt. I., 1657<br>,, II., 1658<br>,, III., 1659 | 1588-1659 | 1609-1639 | K.B. | The author. | From his own MS. | English, from unpublished French original. |
| Croke . . | Cro. Car. 1657<br>,, Jac. 1658<br>,, Eliza. 1661 | 1560-1641-2 | 1582-1641 | K.B.; C.P.; A few cases in Ch., Exch., and Ct. of Wards. | Sir Harbottle Grimstone. | Translated from French by the editor, from the author's MS. | English, from unpublished French original. |
| Hetley . . | 1657 | Unknown | 1627-1632 | C.P. | An anonymous editor. | The author's MS. | English. |
| Lane . . | 1657 | 1584-1650 | 1605-1612 | Ex. | An anonymous editor. | No account. | English. |
| Winch . . | 1657 | 1545-1625 | 1621-1625 | C.P. | An anonymous editor. | No account. Not all by Winch. | English tr. from an unpublished French original. |
| Leonard . . | Pt. I., 1658<br>,, II., 1659<br>,, III., 1663<br>,, IV., 1675 | Elizabeth's and James I.'s reigns | 1540-1615 | K.B.; C.P.; Ex. | W. Hughes. | From author's MS. in the possession of the editor. | English. Tr. from French by the editor. |
| Style . . | 1658 | 1603-1679 | 1645-1656 | Upper Bench. | The author. | The author's MS. | English. |

TABLE SHOWING THE REPORTS OF THE SIXTEENTH AND FIRST HALF OF THE SEVENTEENTH CENTURIES

| Name. | Date of First Publication. | Date of Author. | Period over which Reports Extend. | Courts in which Cases are reported. | By whom Published and Edited. | Origin of MS. | Language in which First Published. |
|---|---|---|---|---|---|---|---|
| Ley . . . | 1659 | 1552-1629 | 1608-1629 | K.B.; C.P.; Ex.; Star Chamber; Ct. of Wards. | An anonymous editor. | The author's MS. | English. |
| Benloe [or Bendlowes] (sometimes called *New Benloe*) | 1661 | 1516-1584 | 1531-1638 | K.B.; C.P.; Ex. | An anonymous editor, who has obviously included reports from other sources. | No account. | French. |
| Jenkins . . | 1661 | 1586-1663 | 1220-1623 | Ex. Chamber, and writs of error in the K.B. | The author. | The author's MS. | French. Tr., 1734. |
| Yelverton . | 1661 | 1566-1630 | 1603-1613 | K.B. | Wylde. | From the original MS. in Twisden's possession. | French. Tr., 1735. |
| Latch . . | 1662 | Unknown | 1625-1628 | K.B. | Edited by E.W. | Taken by Latch, from some other MS. | French. Tr., 1793. |
| Moore . . | 1663 | 1558-1621 | 1512-1621 | K.B.; C.P.; Ex.; Ch.; Star Chamber; Ct. of Wards. | The author's son-in-law, Sir Geoffry Palmer. | Author's MS. | French. |
| Anderson . . | 1664 | 1530-1605 | 1534-1604 | C.P., and Ct. of Wards. | An anonymous editor. | Author's MS. "ore remaneant en les maines del Imprimeur." | French. |



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|---|---|---|---|---|---|---|---|
| Jones, Sir W. | 1675 | 1566-1640 | 1620-1641 | K.B.; C.P.; H. of L., cases heard on Oxford circuit, notes taken at a Justice Seat. | His daughters, Dorothy Faulconberge, and Lucy Jones. | The author's MS. | French. |
| Rolle . . | 1675-6 | 1589-1656 | 1614-1625 | K.B. | An anonymous editor. | The author's MS. | French. |
| Savile . . | 1675 | 1545-1607 | 1580-1594 | C.P.; Ex. | Richardson. | No account. | French. |
| Palmer . . | 1678 | 1598-1670 | 1619-1629 | K.B.; C.P. | An anonymous editor. | The author's MS. | French. |
| Aleyn . . | 1681 | Unknown | 1646-1649 | Upper Bench. | An anonymous editor. | No account. | English. |
| Littleton . . | 1683 | 1589-1645 | 1626-1632 | C.P.; Ex. | An anonymous editor. | MS. said to be found among the papers of his brother, a baron of the Exchequer. | French. |
| Benloe and Dalison | 1689 | Benloe, Serjt., 1555, Dalison, ? -1559 | 1486-1580 | C.P. | Rowe. | Various MSS. of these reports collected by the editor. | French. |
| Hardres . . | 1693 | 1610-1681 | 1654-1669 | Ex. | An anonymous editor. | From the author's MS. | English. |
| Siderfin . . | Pt. I., 1683<br>,, II., 1684 | Seventeenth century | Pt. I. 1660-1670<br>,, II. 1657-1659 | K.B.; C.P.; Ex. | Pt. I., John Gee<br>,, II., Robert Siderfin. | Author's MS. | French. |

which our printed volumes are based; and (iv) in the variety of their contents and style.

(i) *Origins.* The capacity to take notes swiftly and accurately was a very necessary accomplishment for a lawyer from a very early period in the history of the common law.[1] As in the Middle Ages, so in this period, the reports were made primarily, not for publication, but for the reporter's own use. Even Plowden's[2] and Coke's[3] reports, though afterwards published by their authors, were made primarily for their own use. It is not therefore surprising to find that some of these reports contain cases, not reported at first hand by the reporter, but copied from some other source; while others contain cases decided after the author's death. A good many of Dyer's reports, for instance, must have been copied by him from some MS., unless it can be supposed that he began to make his reports at the age of one year.[4] It is clear also from the preface, written by his nephews to their selection from his reports, that they were made for his own private use, and not with any idea of publication.[5] But the style in which a man writes for his own use will generally be very different from the style in which he writes for publication. The MS. will not be so carefully corrected, and there will sometimes be a repetition or a hiatus. As Lord Ellesmere said in the Star Chamber, "In Diar are reports as he heard them, and also opinions

[1] See Manningham's Diary (C.S.) xvii; the editor, noticing the skill with which Manningham made notes of sermons, says—"one is inclined to suspect that the business of note taking may have been at that time one of the branches of legal education;" more probably necessity made it, as at the present day, an accomplishment which every student must acquire by practice.

[2] "This work I originally entered upon with a view to my own private instruction only, without the least thought or intention of letting it appear in print," Plowden's Rep. Pref. iii.

[3] "I have since the 22nd year of her Majesty's reign, which is now twenty years compleat, observed the true reasons, as near as I could, of such matters in law . . . as have been adjudged upon great and mature deliberation; and as I never meant . . . to keep them so secret for my own private use as to deny the request of any friend to have either view or copy of any of them: so till of late I never could be persuaded . . . to commit them to print," 1 Co. Rep. Pref.; 7 Co. Rep. Pref. he tells us that he first made the report of Calvin's Case for "his own private use."

[4] Dyer's life was from 1512-1582; the cases in his reports extend from 1513-1582; other instances of reports not made at first hand by the reporter are the books of Latch's and Gouldesborough's reports, while Dalison, Winch, Popham and Owen contain cases decided after their authors' deaths, Wallace op. cit. 18.

[5] It appears that his nephews only published them because they were much pressed to do so; and that they only published a selection; but it would appear that Dyer himself contemplated a revision with a view to publication of some of his reports; Vaillant, in the Preface to his edition and translation, cites the following note from the MS.—"Here followe certaine cases of Lord Dier's collection which for some private reasons hee thought fitt not to make them vulgarr;" in fact somewhat the same reasons seem to have prevented publication of all a man's reports immediately after his death as now prevent too speedy a publication of his memoirs; Farewell and Dyer particularly point out that they have published nothing which "may tend to the deprivation slander or discredit of any persons, their estates or titles."



and doubtes, and thus are strange things printed which detract greatly from the authority of Diar's book."[1] What is true of Dyer's reports is also true of the reports of many of his contemporaries, e.g. of Anderson, Popham, Hobart, Benloe, and Dalison. In one or two cases indeed the reports were written or prepared by the author for publication and published by him—the reports of Plowden and Coke are the most famous and the earliest instances—but even in their cases publication was an after thought.[2] Later we have the reports of Davis, Bulstrode, Style, Calthorpe, March, Clayton, and the collection of Jenkins, all of which were written in order to be published. Thus the origin of some of these reports is similar to the origin of at any rate some of the Year Books—they were collections of cases made by the author for his own use in his own practice;[3] and, naturally, they have similar imperfections. Moreover, if it be true that others of the Year Books were compiled from notes taken that they might be copied and published,[4] their origin may be compared to those of the reports which were written or revised with a view to publication.

(ii) *Circumstances of publication.* We can see the same general likeness between the Year Books and the reports in the circumstances under which many of them were printed and published. It is probable that in this, as in the mediæval period, most lawyers made collections of cases. Sometimes they copied from other collections, and sometimes they reported what they had heard in court. It is clear that the possession of such a collection, made by a distinguished lawyer, would be a great help to a practitioner. Some lawyers freely lent their collections of cases;[5] but others, when they had got hold of such a collection, were unwilling to allow other people to see it. Exclusive access to authoritative information of this kind would be an obvious advantage to them in their practice.[6] But for these same reasons the competition of students, practitioners and publishers to get hold of these collections, known to be circulating amongst the author's friends, was very keen. Nor were the publishers very scrupulous as to the methods they employed. Plowden tells us

[1] Hawarde, Les Reportes etc. 127; cp. Burrow's remarks upon Bunbury's reports 5 Burr at p. 2659.

[2] As to Coke see above 364 n. 3; as to Plowden see below 366 n. 1.

[3] Vol. ii 536.

[4] Ibid 539-540.

[5] E.g. Plowden and Coke, above n. 2; and cp. Pref. to Leonard's Reports.

[6] Thus the editors of W. Jones's Reports say that the reason why they were not published earlier was because, "the MS being lent to Serjeant Glinne, presently after the author's death, was by him appropriated to his own use;" and the reason assigned in the preface for the late publication of Littleton's reports was the fact that they had come to the hands of his brother, one of the barons of the Exchequer, who kept them for his own private use.

that he had resolved to publish his reports, because copies had been hastily and incorrectly copied, and it seemed likely that these copies would be published without his authority.[1] Down to 1640 it is probable that the strict licensing system enforced by the Star Chamber, though it did not prevent the circulation of incorrect reports in MS.,[2] prevented the publishers from foisting absolutely spurious reports upon the public. But under the Commonwealth this form of control was less effective. A large number of reports were published between 1640 and 1660, under the names of lawyers of good repute, which contained many obvious errors.[3] Their editing and printing was as slovenly as that of many of the printed Year Books. Indeed, in the case of some, there is no evidence at all that the author whose name was attached to the volume had ever written it.[4] In other cases it is clear that the author was not the actual reporter of the cases. Thus Owen's reports contain cases decided after his death;[5] and the editor of Palmer's reports states that 120 of Palmer's cases had been

[1] "Having lent my said book to a very few of my intimate friends, at their special instance and request and but for a short time, their clerks and others knowing thereof got the book into their hands, and made such expedition by writing day and night, that in a short time they had transcribed a great number of the cases . . . which copies at last came to the hands of some of the printers, who intended (as I was informed) to make a profit of them by publishing them. But the cases being transcribed by clerks and other ignorant persons . . . the copies were very corrupt, for in some places a whole line was omitted, and in others one word was put for another, which entirely changed the sense, and again in other places spaces were left where the writers did not understand the words. . . . Wherefore in order to prevent and avoid these defects, I considered with myself whether it was not better for me to put this work in print," Plowden's Rep. Pref. iv; similar reasons are given for the publication of J. Kelyng's and Winch's Reports, see Wallace, op. cit. 13 n. The same thing happened in the case of other books, see the Preface to Theloall's Digest of Writs; Browne's Religio Medici was surreptitiously published in 1682; and at a much later period the circulation of inaccurate notes of a distinguished lawyer's works sometimes induced their author to publish the works themselves, see the Pref. to Preston's Ed. of Sheppard's Touchstone; see vol. iv 112-113 for the manner in which the publishers plagiarized the various short tracts concerning the justices of the peace and other topics of local government, in circulation at the beginning of the sixteenth century.

[2] Coke, in 1 Co. Rep. Pref. says—"I have often observed, that for want of a true and certain report, the case that hath been adjudged, standing upon the racke of manie running reports (especially of such as understood not the state of the question) hath been so diversely drawne out, as many times the true parts of the case have been disordered and disjointed, and most commonly the right reason and rule of the Judges utterly mistaken. Hereout have sprung many absurd and strange opinions, which, being carried about in a common charme, and fathered on grave and reverend Judges, many times with the multitude, and sometimes with the learned, receive such allowance as either beguile or bedazil their conceits and judgments."

[3] See Grimstone's Pref. to 3 Cro.—"A multitude of flying Reports (whose authors are as uncertain as the times when taken, and the causes and reasons of the judgments as obscure as by whom judged) have of late surreptitiously crept forth. . . . Also to the contempt of our common law itself, and of divers of our former grave and learned justices and professors thereof, whose honoured and reverend names have in some of the said books been abused and invocated to patronize the undigested crudities of those plagiaries:" see to the same effect the Prefaces to Bulstrode's Reports, and Style's Reports.

[4] Wallace, op. cit. 13-18.

[5] Ibid 18.



incorrectly transcribed by Latch.[1] No doubt these volumes often appeared with the sanction of distinguished judges; and their licence was necessary after the Restoration.[2] But unless the licence to publish expressly states that the signatories know and attest the worth of the book, it affords but little guarantee of its authority.[3] Publishers sometimes made free with distinguished names. Bulstrode was made to approve the print of Part 12 of Coke's reports, though he had expressly stated that it was full of errors; and he thought it necessary in the preface to his own reports to vindicate his own competence by a statement of the real facts.[4]

In some cases we know little or nothing about a reporter. Occasionally indeed we get a stray reference which shows us that he is really a human, and even an able person. Thus Siderfin devilled for Francis North, the future Lord Guildford, when he was at the bar; and Roger North has preserved the memory of his rustic behaviour, his hatchet face, his shoulder of mutton hand, and his uncouth walk, together with his good nature, his industry, his ability, and his probity and exact justice to his clients.[5] But generally we must judge of the merits of any given reporter merely from internal evidence; and even if the reports purport to be and were really written by some well-known lawyer whose name appears on the title page, it may well be that the reports are not of first-rate authority. In many cases it is clear that publishers never stopped to consider whether the MS. which they were printing was the best that could be got. They printed the first MS. that came to hand; and that MS. was often very corrupt for the same reason that the Year Book MSS. are corrupt. "Most books," says Mr. Wallace,[6] "even when printed after death, are secured from imposition because they subsist in a single copy, written or revised by the authors; and the faults of the printed

[1] Palmer's Reports Pref.

[2] Vol. vi 368, 372.

[3] Wallace, op. cit. 34 n. 3—"I have remarked, on comparing numbers of these certificates together, that there is a difference, and apparently an intended difference, between their language; and yet farther, that in an imperfect degree, the strength of the certificate does tally with the commonly received reputation of the book;" thus some reports are merely "allowed," others are "allowed and recommended," others are certified to be "very good," others to be printed from a genuine MS., the certificates of others deliberately abstain from saying anything about authorship.

[4] Below 462 n. 5.

[5] Lives of the Norths i 93, 94—"This Mr. Syderfin was a Somerset gentleman and proved a very good lawyer, as his book two volumes in folio of Reports of his shows. But he was not a better lawyer than a kind and good natured friend: having very good qualities under a rustic behaviour and more uncouth physiognomy. He used at the Temple to be described by his hatchet face and shoulder of mutton hand, and he walked splay, stooping and noddling;" North says that "the only thing which I ever heard him blamed for, was the marrying a lady that was his ward before her minority was expired."

[6] Op. cit. 11, 12.

volume must be the faults of the descent. But of the reporters, the original was lent, not to be printed, but to be copied. It was vitiated by transcript after transcript; mistaken by blunders of the penman; enlarged perhaps to introduce cases, and mutilated to exclude them. Ignorance and interest, and accident and recklessness and the haste of fraud, all combined to produce error; and the work would be printed at last, without the concurrence of the author, without the consent of the proprietor; and thrust surreptitiously upon the world from that copy, perhaps, which was the most corrupted of all." We have seen that these words might have been written of some of the earlier Year Books.[1] That they are true will be seen if we look at the history of the reports which bear the name of Benloe and Dalison.[2] In 1609 there were published, at the end of Ashe's Epieicheia,[3] some cases reported by Benloe and others reported by Dalison, which bore upon the topic of the book—the interpretation of statutes by equity. These cases were also inserted in the second edition of Keilway, which was published in 1633. In 1660 another set of cases, decided between 1531 and 1628, was published under the name of Benloe. There were also other MSS. of Dalison's reports in existence; Lambard and Coke cite cases from some of these MSS.; and there were other MSS. in circulation which contained cases decided after his death. In 1689 Rowe collated the various MSS. both of Benloe and of Dalison, and produced the book of reports which pass under their names.

There is, moreover, another chance of error in some of these printed reports (especially in those published during the Commonwealth period) which is not present in the early printed Year Books. They were published in a translated form, because English had then been made the language of the courts;[4] and, in the absence of the MS., there is no guarantee that the translation is correct. Translation from a badly written and imperfect MS. was no easy task.[5] Grimston tells us something of the difficulty which he had with the French MS. of Croke's reports;[6] and it is probable that the translation of the last two parts of Coke's reports is very incorrect.[1]

(iii) *MS. Authority.* Having regard to these facts, it is not surprising to find that at least as many unpublished MSS. exist of the printed reports as of the printed Year Books; and that the number of unpublished reports is at least equal to the number of unpublished Year Books. This is made abundantly clear by a pamphlet written in 1834 by Richard Pheney, which Mr. Wallace has printed as an Appendix to his book on the Reporters;[2] and doubtless a systematic search would reveal other MSS. It is probable therefore that a critical edition of some of the earlier printed reports, or of some of the unpublished MSS., would be as serviceable to the cause of legal history as the analogous work which is being done upon the Year Books.[3] But though, doubtless, new critical editions of some of our printed reports would reveal negligences and ignorances parallel to those revealed by the new critical editions of some of the printed Year Books, it can hardly be contended that such editions are as necessary as new editions of the Year Books. The law laid down in these reports is nearer to our own times; and consequently a continuous professional tradition exists, which enables the relative merits or demerits of the different reporters to be appraised, and the necessary corrections to be made. Though we may not have "earned the right to guess" what a Year Book ought to say,[4] we have, in some measure, earned the right to guess what, in a large number of the cases, our modern reports ought to say.

(iv) *Contents and Style.* The variety of the contents and style of these early modern reports presents a close parallel to the variety of the contents and style of the Year Books. We have seen that the Year Books often give us very discursive accounts of the proceedings in court.[5] The arguments of counsel, the remarks of the judges, and the notes of the reporter often seem to

[1] Vol. ii 530-531.

[2] Wallace, op. cit. 115-118; Pref. to Rowe's Ed.

[3] For this book see vol. iv 312.

[4] Wallace, op. cit. 20.

[5] Ibid 20, 21—"When you consider the cryptographic abbreviations which in olden times marked alike the court and the common hand; that the original MS. having been generally designed but for private use, would be filled with symbols understood by the authors alone; and, above all, that the usually anonymous translator was secure from any comparison of his translation with the original—you can readily conceive the value of this element of imperfection."

[6] "I have taken upon me the resolution and task of extracting and extricating these Reports out of their dark originalls: they being written in so small and close an hand, that I may truly say they are *folia sybillina*, as difficult, as excellent," Cro. Car. Pref.



[1] "It appears that the 12th and 13th Parts, though originally written like the others in French, were never published in that language. The first edition of the 12th Part in 1656 was in English. It is not very correctly translated, and though there are at least five manuscript copies in the original French, all accessible . . . this old translation of 1656 is still the only one known to the profession," Wallace, op. cit. 170.

[2] Ibid 595-634; D'Ewes, Autobiography i 300 tells us that, till his marriage in 1626, he reported cases in the Common Pleas fairly regularly; that he ceased to do so then, "Yet did I frame up a pretty little volume in folio of the reports I took . . . which remaineth fair written still in mine own custody, being penned by me in our ordinary law French"; cp. Smith v. Gatewood (1607) Cro. Jac. 152 for a reference made by Coke to Spelman's Reports; in Calvin's Case 7 Co. Rep. at f. 9b Coke cited "Hingham's Reports *tempore* E.I. . . . written in parchment, in an ancient hand of that time."

[3] Vol. ii 531-532.

[4] Y.B. 1, 2 Ed. V. (S.S.) xxviii, cited vol. ii 530.

[5] Ibid 545-552.

be quite as important as the actual decision. Often no decision at all is reported. We see much the same variety in the contents of these early reports. The arguments of counsel were sometimes reported at greater length than the arguments of the judges.[1] Many reporters and editors thought that it was their duty to polish the arguments, and perhaps to add something of their own.[2] They record not only decided cases, but also short dicta on points which struck them as interesting;[3] and they often insert a note upon memorable happenings in court—a call of serjeants or the creation of a judge.[4] They still like to report picturesque incidents or unusual events. Thus Dyer records that the members of a jury were fined each 40 pence because they ate and drank before giving their verdict—notwithstanding their naïve defence that, on their way to court, after having agreed on their verdict, "they saw Rede Chief Justice going on the way to see an affray, and they followed him, and in going, they saw a cup and drank out of it."[5] Plowden tells us in *Wrotesley* v. *Adams* that Brown, J. did not argue because "he was so old that his senses were decayed, and his voice could not be heard."[6] None might assign error upon an indictment unless he appeared in person; and Croke relates how Sir W. Read, an old man of ninety, and infirm, "was brought from his house, ten miles from London, in a horse litter on men's shoulders to the Bar, and came into Court and assigned his error."[7] The same reporter relates in some detail the course of the proceedings on a writ de ventre inspiciendo.[8] When a judge or famous lawyer died they often insert a few lines of obituary eulogy[9]—sometimes even citing the Latin verses composed in honour of the deceased.[10]

We have seen, too, that the earliest Year Books were designed quite as much to afford instruction for pleaders as to record the decisions of the court.[11] This need also is kept in view by the

[1] E.g. in Sharington v. Strotton (1566) Plowden 300 the arguments are given at length, but the judgment was given so shortly that Plowden asked the judges for their reasons, which are contained in a very few sentences.

[2] See the Pref. to Dyer's reports by Farewell and Dyer; and cp. the long disquisition upon the meaning of equity given by Plowden at pp. 465-468.

[3] See e.g. three notes on Annuities in Gouldesborough's Rep. 31.

[4] See e.g. Cro. Car. 1-4—an account of new creations of judges and serjeants on the accession of Charles I.; ibid 67—a creation of serjeants; ibid 127-128—a question as to the precedence of Croke J. on his removal from the Common Pleas to the King's Bench; 375—the removal of Heath, and his subsequent appearance at the Common Pleas bar as a serjeant.

[5] Dyer 37b. [6] Plowden 190.

[7] Cro. Jac. 617. [8] Ibid 685.

[9] Cro. Car. 28—Hobart; 203—Walter; 6 Co. Rep. 74b—Popham; 9 Co. Rep. 15a—Dyer; 10 Co. Rep. 35a—Fleming.

[10] Plowden 376—citing verses made in praise of Brown J.; Cro. Car. 127—appreciation of Doddridge J.

[11] Vol. ii 538.



early reporters. It is emphasized by Plowden;[1] and Coke,[2] and other reporters sometimes copy the pleadings from the record. Thus it will be seen that there was no common consent as to the style which a law report should take. As with the Year Books, so with these early reports, we get all sorts of style and all sorts of arrangement.[3] Sometimes, as in the first volume of Brownlow and Gouldesborough, we get a collection of cases turning upon a particular topic—in this case the different forms of action. Sometimes, as in some of the cases reported in Bendloe, we get only short notes of decisions. Sometimes, as in Croke, we get a summary of the arguments and the decision stated at moderate length. In Plowden we get elaborate reports of the record, arguments, and decision, together with comments of the reporter himself. Very often, as we shall see, Coke gives us rather a critical exposition of a legal topic rather than a report.[4]

It is thus obvious that the contents and style of these early reports have much in common with the contents and style of the Year Books. There is no sudden transition. But, if we look at these reports as a whole, we can see that differences are emerging, which will, in time, give rise to a form of law report quite different from that of the Year Book. At the present day a reporter aims at giving a faithful account of the point or points at issue in the case, the decision on these points, the reasons for the decision, and such a summary of the arguments as will make the points at issue and the decision upon them intelligible. In the sixteenth and early seventeenth centuries we can see in operation some of the causes which will lead to the growth of the modern style of reporting.

In the first place, the change from the system of oral to the system of written pleadings enabled the point at issue to be defined more clearly, and concentrated attention more firmly upon the decision of that point.[5] The interest tended to shift from

[1] "This book consists of two several kinds of work, the one is, a book of Entries, more sure and safe to be relied upon and followed than any other book of Entries. For . . . in this book there is no record entered but such upon which there was either a demurrer in law, or a special verdict given containing a point of law, in both which cases the matter was thoroughly sifted and debated at the Bar and at the Bench also, and in the end either approved or disapproved, for the causes shown in this book, by the judgment of the Court," Plowden's Rep. Pref. at pp. iv, v.

[2] Coke tells us, 8 Co. Rep. Pref. xxv, that he has reported Caly's Case, "To this end, that students, seeing the singular use of original writs, will, in the beginning of their study learn them, or at least the principallest of them without Book, whereby they shall attain unto these things of no small moment: 1. to the right understanding of their books: 2. to the true sense and judgment of the law: and lastly to the exquisite form and manner of pleading."

[3] Vol. ii 539-540. [4] Below 463.

[5] Thus in Woodland and Mantel v. Redsole (1553) Plowden at p. 95, Bromley J. is reported to have said—"this diversity that you put is moved by the way in the years of Henry 7, but there is no principal case adjudged upon it."

the argument leading to the formulation of the issue to the decision upon that issue; and to make it clear that, as a general rule, reportable cases were those which turned, not on an issue of fact, but upon an issue of law.[1] Edmund Plowden, who was perhaps the most learned lawyer in a century of learned lawyers, who, it is said, might have been Lord Chancellor of England but for his adherence to the Roman church, was the pioneer of the modern style of law report. "All the cases here reported," he says,[2] "are upon points of law tried and debated upon Demurrers or special verdicts, copies whereof were delivered to the judges, who studied and considered them, and for the most part argued in them, and after great and mature Deliberation gave Judgment thereupon. . . . And as to such cases as were argued by others, whereupon no Judgment was given in any point (of which cases there are many) I have staid and suspended my notes and Reports of the Arguments made in them." Coke, who justly eulogises Plowden's reports as "exquisite and elaborate,"[3] shows, by his definition of the term "report," and by his advice as to the use of reports, that the modern conception was gaining ground. He defines a report as "a public relation or a bringing again to memory cases judicially argued, debated, resolved, or adjudged in any of the king's courts of justice, together with such causes and reasons as were delivered by the judges of the same;"[4] and, in the *Case of Alton Woods*,[5] he says, "in the reports and arguments of matters in law the point adjudged is principally to be observed, and not matters of discourse which do not tend to the point adjudged." Obviously the centre of interest is shifting from the debate in court to the decision of the court.

In the second place, this change necessarily led to the growth of the modern view as to the authority of decided cases; and this, in its turn, led to the growth of the practice of constantly citing cases in court, sometimes on the point and sometimes at a great distance from the point. Coke accurately describes the contrast between the old practice and the new.[6] "The ancient order of arguments by our serjeants and apprentices of law at the bar is altogether altered. 1. They never cited any book, case, or authority in particular . . . but *est tenus ore agree in nostre livres, ou est tenus adjudge in termes* or such like, which order yet remains in moots at the bar in the Inner Temple to this day. 2. Then was the citing general, but always true in the particular; and now the citing is particular, and the matter

[1] Vol. iii 654-655; below 374 n. 1.
[2] Preface at p. v.
[3] 3 Co. Rep. Pref.
[4] Co. Litt. 293a.
[5] (1595-1600) 1 Co. Rep. at f. 52a.
[6] 10 Co. Rep. Pref. xii: cp. vol. ii 541-542.



many times mistaken in general. 3. In those days few cases in law were cited, but very pithily . . . and now . . . such a farrago of authorities, it cannot be but there is much refuse." Clearly it was decisions and the reasons for them which were coming to be useful to the profession;[1] and the appreciation of this fact will tend to prevent reporters from incumbering their reports with the recital of the miscellaneous events passing in court which was formerly customary. The report will tend to assume something of the impersonal character of the record.

In the third place, the demand for accurate decisions will tend to the growth of reports made in order to be published. A man's own notes made for himself will no doubt be useful enough to the taker. He generally has some sort of recollection of the events noted, and can silently correct inaccuracies. But we can see from many of the reports of this period that such notes will not bear publication without a great deal of revision. Reports made in order that they may be published will be obviously far superior to notes of cases made without any idea of publication. Plowden is again the pioneer of the habit of methodical and accurate reporting. He tells us that often before the case was argued he had studied the record with such care that he could have argued the case itself; and that after he had prepared his report he submitted it for correction to the serjeants and judges who had argued in it.[2] Coke, too, carefully revised the reports which he published, and was unwilling that any work of his not so revised should be published after his death.[3]

It is not till the middle of the eighteenth century that we get, in the reports of Burrow, the beginnings of the regular series of authorized reporters attached to particular courts, who regularly made reports of the decisions of those courts for publication. During the whole of this period, the reports published were mainly posthumous publications of notes of cases taken by the

[1] Above 371 n. 5.

[2] "And in order that I might execute this work with the utmost sincerity and truth, and to the intent that I might be more able to understand the arguments, and to comprehend the true causes of the judgments herein contained, let me inform the reader that in almost all the cases which I have undertaken to report, before they came to be argued, I had copies of the records, and took pains to study the points of law arising thereupon, so that often times I was so much master of them, that if I had been put to it, I was ready to have argued when the first man began. . . . And besides this, after I had drawn out my report at large, and before I had entered it into my book, I shewed such cases and arguments, as seemed to me to be the most difficult, and to require the greatest memory, to some of the judges or serjeants who argued in them, in order to have their opinion of the sincerity and truth of the report," Plowden, Pref. v.

[3] "And (if it shall please God) I intend hereafter to set out another work, whereof I have only collected the materials, but not reduced them to such a forme as I intend, lest if I should leave it as it is, it might, after my death, be published (as hath bin done in the like case) before it be perfected," 8 Co. Rep. Pref., xxxv.

reporters for their own use. It is not until the rise of these authorized reporters that the reports assume their modern form. But we do see that, under the pressure of professional needs, the reports of this period are, in their contents and style, gradually approximating to the contents and style of a modern law report. Bacon, at the beginning of the seventeenth century, had already foreshadowed the shape which the reports will eventually assume.[1] But this development was then in the future. The reports of this period thus form the connecting link between the Year Books and those modern law reports, which begin with the authorized reports of the latter half of the eighteenth century; just as these authorized reports form the connecting link between the reports of this period and our semi-official series of the Law Reports.[2]

At the close of this period it was becoming clear that the growth of the modern reports was rendering the old abridgments of the Year Books quite inadequate to the needs of the practitioner. For some time this need was met by abstracts or digests of, and indices to, the regular reports. Several of these were published by different authors;[3] but the author who made a speciality of this kind of literature was Thomas Ashe, who became a Bencher of Gray's Inn in 1597.[4] In 1600 he wrote a table to Dyer's reports,[5] in 1607 an abridgment of Plowden's reports,[6] in 1609 an abridgment of Dyer's reports,[7] in 1625 a collection of new cases of the time of Henry VIII., Edward VI., and Mary taken from Brooke's Abridgment,[8] and an abridgment of Coke's

[1] De Augmentis, Bk. viii c. 3 Aph. 74—"Let this be the method of taking down judgments and committing them to writing. Record the cases precisely, the judgments themselves word for word; add the reasons which the judges allege for their judgments: do not mix up the authority of cases brought forward as examples with the principal case; and omit the perorations of counsel, unless they contain something very remarkable;" the translation is Spedding's.

[2] See C. C. Soule, The Lawyer's Reference Manual 66-67.

[3] E.g. we get abstracts of Coke's Reports by J. Davis; of Coke upon Littleton by Davenport; of the Doctor and Student; and of Dyer's Reports; see Thomas Basset, A catalogue of the common and statute law books of the realm (1671) 3; cp. also ibid pp. 85-87 for other tables and indices; among them we may note Fleetwood's Tables to the Y.BB.; and Townshend's Tables to the printed precedents of pleadings; we even get indices to the Abridgments; J. Rastell in 1517 published The Tables to Fitzherbert's Abridgment, Reeves H.E.L. iii 432; in 1553 an Abridgment to the Book of Assizes was published, ibid 565; and to the 1679 ed. of the Y.BB. of the second part of Henry VI.'s reign (21-39 Hy. VI.) there is annexed a very good index and abridgment made by Robert Barnwal of Gray's Inn.

[4] Dict. Nat. Biog.

[5] "Le Table al Lievr des Reportes del tres reverend Judge Si. Ja. Dyer."

[6] "Abridgement des touts les Cases Reportes a large per Mounsieur Plowden ovesques les Exceptions al pleadings et leur Responses les resolutions des matters in Ley et touts auters principal matters surdants sur les arguments de mesmes."

[7] "Un Abridgement de touts les cases reportes per Mounsieur Jasques Dyer;" this work is anonymous, but it is attributed to Ashe in the Bodleian catalogue.

[8] "Ascuns nouvel Cases de les ans et temps le Roy H. 8, Edw. 6 et la Roygne Marie. Escrie en la grand Abridgement compose par Robert Brook;" at the end are "Aliquot Casus in quibusdam lecturis Temp. H. 8 et H. 7 cum paucis aliis casibus et regulis."



reports together with an index of cases and an index to the subject matter.[1] But his greatest work (published in 1614) was his "Promptuary or Reportory Generall de les annals et plusors autres livres del comen ley dengleterre." It consists of two volumes divided into four parts. At the end of each volume is additional matter published since the book was printed.[2] At the end of the second volume there is also a list of authors drawn upon, and a collection of eulogies upon deceased judges taken from Coke's reports. The book itself is something between an abridgment and an index. It gives under alphabetical heads, rather the list of references where the law can be found, than the principles of the law itself. The headings no doubt suggest the principles: but the author does not state the principles explicitly.[3] But these abstracts, digests, and indices did not do for the modern sources of law what the old abridgments had done for the Year Books. It was becoming obvious, at the end of this period, that a complete and up-to-date abridgment was much needed. The need was met by the publication in 1668 of Rolle's Abridgment.

Henry Rolle[4] was born in 1589, and was educated at Exeter College, Oxford, and the Inner Temple. He was made serjeant at law in 1640. He was a member of James I.'s last Parliament, and of the first three parliaments of Charles I.'s reign; and, from the first, he identified himself with the constitutional opposition. In 1645 he was created a judge of the King's Bench, and in 1648 chief justice. He accepted a renewal of his commission after the execution of Charles I., and acted as a member of the Council of State. In 1654, he narrowly escaped being hanged by a party of royalists led by Penruddock, who had surprised Salisbury while he was holding the assizes there. He was not disposed to agree to all Cromwell's arbitrary acts, and obtained his discharge from his judicial office in 1655. He died in the following year. He was one of that band of literary lawyers which, as we shall see,[5] distinguished the earlier years of the seventeenth century. Hale draws a pleasant picture of the manner in which Rolle,

[1] "Un general Table a touts les several livres de les Reportes de le darreine tres reverend Judge Sir Edward Coke Chevalier, jadis chiefe justice de Bank le roy, per quelle touts les cases et matters in yceux conteynus puissont facillment estre trouves. Ovesques deux catalogues Alphabetical, L'un de les principal cases, l'autre de touts les general titres naturalment surdant hors del matter des dits Reports;" no date.

[2] Principally taken from the 10th part of Coke's Reports.

[3] An example will show this; vol. i p. 10 the heading is, "Action sur le case § 8," and we read, "Ou accion sur cas gist vers cestuique garant chose vendu ou auterment, et ou le garante est material ou nemy," followed by a list of references to Dyer, F.N.B., Kitchin, Keilway. and also to another § in his own book.

[4] Foss, op. cit. vi 472-475; Dict. Nat. Biog.

[5] Below 402-403.

Littleton,[1] afterwards chief justice of the Common Pleas and lord keeper, Herbert, afterwards attorney general, Gardyner, afterwards recorder of London, and Selden[2]—"that treasury of all kinds of learning"—met constantly and almost daily, "to bring in their several acquests in learning as it were into a common stock by mutual communication, whereby each of them became in a great measure the participant and common possessor of the others' learning and knowledge."[3] His Abridgment, like his reports, was compiled by the author for his own use. It was probably written before 1640;[4] and was published posthumously[5] with an introduction by Hale; and this introduction is, as we shall see, a valuable historical summary of the development of the common law up to the time of the Restoration.[6]

The historical importance of this Abridgement is the fact that it marks a new departure in the literature of Abridgments. The older abridgments had simply digested Year Book cases under alphabetical headings.[7] Their great defect was the heterogeneous character of the entries collected under each alphabetical head. This defect had been pointed out by Staunford in 1548;[8] and Francis Bacon had suggested the composition of a new abridgment which should be more orderly in its arrangement.[9] Rolle's Abridgment to some extent remedied this defect—each topic was divided, as Staunford had suggested, into separate headings. But what distinguishes it even more markedly from the abridgments of the older type is the fact that it is more than a mere digest of case law. It contains summaries both of Parliamentary records and of statutes; and therefore it comes nearer than the old abridgments came to being a digest of the whole law. For both these reasons it was long a model to future

[1] Above 257.

[2] Above 10-11; below 407-412.

[3] Hale's Pref. to Rolle's Abridgment.

[4] Foss, op. cit. vi 473, says—"Four times appointed Reader of his Inn, he was prevented by the prevailing plague from performing the duties of that office till the last occasion in Lent, 1639; but during his leisure he employed himself in compiling that 'Abridgment of Cases and Resolutions of the Law,' which has been held up by some of the ablest lawyers as an example to be followed for its perspicuity and method."

[5] Hale's Pref. to Rolle's Abridgment. [6] Vol. vi 624-626.

[7] For these Abridgments see vol. ii. 543-545.

[8] "I would wish that amongest such plenty of lerned men as bee at this day some thing were devysed to help the students of their long jorney . . . whiche thing might wel come to pass after my poore mynd, if such titles as bee in the great abrijement of Justice *Fitzherbert* were by the Judges or some other learned men labored and studied, that is to say, every title by itself by special divisions digested, ordered, and disposed in such sort as that all the judicial acts and cases in the same might bee brought and appere under certain principles, rules, and grounds of the said lawes," Prerogative, Dedication to Nicholas Bacon; he regarded his own work as an essay in this direction.

[9] Spedding, Letters and Life vi 70.



makers of abridgments. It influenced Hughes,[1] Nelson,[2] D'Anvers who translated it and added new cases,[3] and Viner.[4] But when Viner published his work (1741-1756) abridgments compiled on this plan were being superseded by abridgments of a yet more advanced type, which consisted, not of notes of cases and statutes roughly put together under alphabetical heads and somewhat arbitrarily chosen sub-heads, but of collections of scientifically constructed treatises on all branches of the law. Shepherd's[5] Abridgments of 1656[6] and 1675[7] mark the beginnings of this new departure; but they are poor pieces of work; and the transition to this new type of abridgment was not complete till the posthumous publication of Comyns' Digest (1762),[8] and of Bacon's Abridgment (1736). They are the forerunners of the modern legal encyclopædias with which we are all familiar.[9]

Both Coke[10] and Bacon[11] had deprecated the excessive use of

[1] "The Grand Abridgment of the law continued, or a Collection of the Principal Cases and Points of the Common Law of England contained in all the Reports extant from the first of Elizabeth to this present time by way of Common Place." (1660-1662.)

[2] "An Abridgment of the Common Law, being a Collection of the Principal Cases Argued and Adjudged in the several Courts of Westminster Hall, brought down to the year 1725." (1725-1726.)

[3] D'Anvers' work does not go beyond the letter E; his first volume appeared in 1708, his second in 1713, and his third in 1737; in 1727 appeared the single title "Error." It was owing to the existence of this Abridgment that Viner began his work with the letter F, went on to the end of the alphabet, and published the volumes containing the titles A-E last.

[4] See my lecture on Charles Viner and the Abridgments of English Law, L.Q.R. xxxix 34-35; Viner, in the Preface to vol. xiii of his Abridgment, speaks of "My Lord Roll whose Abridgment is my text."

[5] For Shepherd see below 391-392.

[6] "An Epitome of all the Common and Statute Laws of this Nation;" it is dedicated to Oliver Cromwell. It is divided into 170 chapters, alphabetically arranged; they run from "Acceptance" to "Words."

[7] "A Grand Abridgment of the common and statute law of England alphabetically digested under proper heads and titles;" the arrangement of allotting a chapter to each word is abandoned; there are many more headings, and more information is given.

[8] Comyns died in 1740, Foss, Judges viii 114, so that his Digest was probably written before Bacon's.

[9] See my lecture on Charles Viner and the Abridgments of English Law, L.Q.R. xxxix 35-36.

[10] "This I know, that Abridgments in many Professions have greatly profited. the authors themselves; but as they are used, have brought no small Prejudice to others; for the advised and orderly *Reading* over of the books at large in such Manner as elsewhere I have pointed out, I absolutely determine to be the right Way to enduring and perfect knowledge, and to use Abridgments as Tables, and to trust only to the Books at large: For I hold him not discreet that will *sectari rivulos*, when he may *petere fontes*. And certain it is, that the tumultuary reading of Abridgments doth cause a confused Judgment, and a broken and troubled Kind of Delivery *or* Utterance," 4 Co. Rep. Pref.

[11] "I could wish if it were possible that none mought use them but such as had read the course first; that they might serve for repertories to learned lawyers, and not to make a lawyer in haste," Spedding, Letters and Life vi 70.

ready made abridgments by the students of the law. But the collapse, during the latter part of the seventeenth century, of the system of legal education pursued by the Inns of Court, had, as we shall see,[1] made it necessary for students to acquire their knowledge of the law by their own efforts. Hence it became necessary, not only for practitioners, but also for students to make abridgements, or, as they had then come to be called, "commonplace books." Rolle's Abridgment, therefore, became not only a book for practitioners, but also, as Hale points out, an instrument of legal education. "Whereas," he says, "I have commended the making and using of a commonplace book as the best expedient that I know for the orderly and profitable study of the law; this book will be the basis of such a commonplace book."[2] But of this method of acquiring legal knowledge I shall say more in a later chapter.[3]

We shall see that from Rolle's Abridgment we can get both a full and an accurate account of the condition of the common law at the close of this period.[4] But before I can deal satisfactorily with this topic I must first give some account of the literature which was growing up round many of the branches of the common law.

### *The Literature of the Common Law*

The Reports, together with the Abridgments of and the indices to them, are in bulk, and, to a large extent, in substance, the most important part of the literature of the common law. With other important parts of that literature—the works on the justices of the peace and other officials of the local government,[5] on the courts,[6] on the statutes,[7] and on the controversies between law and equity[8] I have already dealt. But these works do not by any means constitute the whole of the literary activity of the common lawyers. This was as fertile a period in the literature of the law as in any other branch of English literature. The old sources—Glanvil,[9] Bracton,[10] Fleta,[11] Britton,[12] the Mirror of Justices,[13] the Register of Writs,[14] the old Tracts on writs and pleading,[15] the old Tenures and Littleton's Tenures,[16] and the

[1] Vol. vi 493-499. [2] Rolle's Ab. Pref. [3] Vol. vi 496.
[4] Below 412-423. [5] Vol. iv 112-121. [6] Ibid 211-212.
[7] Ibid 308-313. [8] Above 269-272.
[9] Vol. ii 189-192; first printed about 1554.
[10] Ibid 236-243; first printed in 1569; quotations had been printed in Staunford's Pleas of the Crown in 1557.
[11] Ibid 321-322; first printed with a dissertation by Selden in 1647. D'Ewes copied the MS. in which he was much interested, Autobiography i 294-295, 300.
[12] Ibid 319-321; first printed in 1540; another edition by Wingate in 1640.
[13] Ibid 327-333; first printed in 1640.
[14] Ibid 512-521; first printed in 1531.
[15] Ibid 521-524. [16] Ibid 573-575.



Year Books[1]—were printed and published. New books were written both on old and new legal topics. Legal history as well as modern law, practical treatises and books on the theory of the law, are all represented; and all helped to give order and form to the mixture of mediæval and modern principles and rules which made up the common law of this period.

The author whose books covered the whole field of the common law, and had the largest influence upon its future development, was Edward Coke. Of him and his writings I shall speak at length in the second part of this chapter.[2] Here I shall deal with the literary activity of his predecessors and contemporaries, without which his work would have been impossible.

The legal literature of this period covers a wide ground. It would be impossible and unprofitable to give an account of all the books which were published. It is only possible to mention some of the most important. They can, I think, be best catalogued and described by dividing them into groups according to their subject matter, as follows:—(i) Books concerning writs and pleadings; (ii) books concerning the land law, and conveyancing and other precedents; (iii) books concerning the criminal law and the law of tort; (iv) the lectures of readers, textbooks, students' books, and law dictionaries; (v) books upon constitutional law and legal history.

#### (i) *Books concerning writs and pleadings.*

We have seen that in the Middle Ages the learning of writs and pleadings was one of the earliest things taught to the student.[3] The main divisions of the law depended upon the differences between the writs by means of which the different forms of action were begun; and to plead correctly was essential to the success of the action so brought. We can say the same of this period. But both the character of the forms of action generally used,[4] and the method of pleading had somewhat changed;[5] and these changes produced corresponding changes in the literature of this branch of the law. Books of the type of the Natura Brevium,[6] which contained collections of and commentaries upon writs, tended to become more definitely separated from books of the type of the Novæ Narrationes,[7] which contained collections of pleadings; and towards the end of this period books of the former kind tended to be replaced by books on procedure of another type. At the same time the growth in

[1] Vol. ii 528-529. [2] Below 423-493.
[3] Vol. ii 498 n. 3, 512. [4] Below 381, 382.
[5] Below 382-387. [6] Vol. ii 522.
[7] Ibid 522-523.

the length and complexity of pleadings caused the books containing precedents of pleading to expand enormously.

The Register of Writs was printed in 1531; but it was too bulky a volume for the student. On the other hand, the students' hand book—the Natura Brevium—was, in spite of efforts to correct it,[1] somewhat out of date. To supply the want of a handy and up-to-date volume, Fitzherbert published his new Natura Brevium in 1534.[2] It was a successful book. It was reprinted in 1537; it was edited by W. Rastell in 1553, who wrote a table of contents;[3] it was illustrated by references to the Year Books and Reports by Sir W. Windham, who was created one of the judges of the King's Bench in 1660; and it was further annotated by Hale. It is the edition of 1730, thus illustrated and annotated, which is still the standard edition. In 1662, there appeared an up-to-date selection of judicial writs with short notes attached to some of them, taken from the MSS. of Richard Brownlow,[4] a famous prothonotary of the Common Pleas, who gave his name to a leading case.[5]

These books, being all in the nature of a commentary upon separate writs, the law is grouped round the particular writ selected. In 1579 Simon Theloall, of the Inner Temple, published a work of another kind entitled a "Digest des Briefs Originals et des choses concernant eux." It owed its origin to the suggestion of Staunford, which I have already cited,[6] that it would be a good idea if lawyers would treat some of the other titles of the Abridgments of the Year Books as he had treated the Title "Prerogative," and write a treatise on them.[7] Staunford illus-

[1] In 1535 Redman published the Natura Brevium "newly corrected in Englishe, with divers addicions of statutes, boke cases, plees in abatementes of the sayd wryttes, and theyr declarations, and barres to the same, added and put in theyr places most conveniente."

[2] Vol. ii 522; Fitzherbert said in his Preface—"Because of late time that book (the Natura Brevium) hath been translated into the English tongue, and many things are therein which are not according to the law of the land, and many other things are omitted which are very profitable and necessary for the understanding of the law; for that cause is this work composed and published."

[3] Reprinted in 1616; for Rastell's Book of Entries see below 384-385.

[4] "Brevia Judicialia, or an exact collection of approved forms of Judiciall Writs in the Common Bench, collected out of the Manuscripts of Richard Brownlow, Esqr., late Chief Prothonotary of the said Court;" the anonymous editor protests in his preface (as the editors of many of the reports protest, above 366-367) that it is really Brownlow's.

[5] For the case of Brownlow v. Mitchell which gave rise to Bacon's famous argument on the writ de non procendendo rege inconsulto, see Bacon's Works (Ed. Spedding) vii 683 seqq., and below 439.

[6] Above 376 n. 9; for Staunford see vol. iv 203-204; below 392.

[7] "Master Justice Staunford in his Preface . . . before his book that he wrote upon the statute of Praerogativa Regis, did declare his opinion that some might commodiously . . . and orderly digest the titles of the Abridgments . . . into certain parts . . . and thereupon methodically to treat, whereby the study of the law might be the more compendious and easie," Theloall's Preface.



trated his meaning by showing how the Title "Brief" might be treated. Theloall chose this title, and wrote his treatise round it for his own use. Having been lent, it found its way, as often happened in such cases, to the printer.[1] It deserved to be printed, as it is the most orderly treatise on procedure, founded on the Year Books, that had yet appeared. The subject is distributed over sixteen books, each dealing with a particular topic; and each book is divided into chapters and paragraphs. It is reprinted at the end of the 1687 edition of the Register; and there is no doubt that it is a very useful commentary thereon, as it contains all the Year Book learning on the writs therein contained. But it naturally tended to lose its usefulness when the Register became antiquated. Historically, it comes between the older commentaries upon writs and the modern books on procedure, with which we must now deal.

The Register and the commentaries upon it were, as we have seen, books of the old order. As Trespass and its offshoots gradually encroached upon the sphere of the older forms of action, as newer courts sprang up, the procedure of which was not that of the common law, these books became less useful to the practitioner. Their place tended to be taken by books of practice which shortly and tersely described the procedure of all the different courts. One of the oldest of a series of books, which is represented to-day by the Annual Practice and its rivals, is the Attourney's Academy,[2] written by Thomas Powell,[3] and published in 1623. Thomas Powell was a poet, a man of letters, and, in the latter part of his life, an industrious student of records. He had, the year before, written a tract giving directions for the search of records;[4] and in 1627 he wrote the Attornies' Almanack, which gave directions as to removing causes or certifying records to the courts at Westminster. These two tracts supplement the principal work, and are often bound up with it. The book gives short practical directions as to the steps which an attorney must take in an action, and the fees which he

[1] Theloall's Preface; see above 366 for the manner in which some of the Reports came to the printer.

[2] "The Attorney's Academy, or the manner and form of proceeding practically upon any suite, plaint, or action whatsoever in any court of record whatsoever within this kingdome . . .; with the moderne and most usual fees of the officers and ministers of such courts."

[3] See Dict. Nat. Biog.

[4] "Direction for search of Records . . . for the clearing of all such titles and questions as the same may concerne, with the accustomed fees of search, and diverse necessarie observations;" in 1631 he published the "Repertoire of Records"; it would appear from D'Ewes' Autobiography i 235, that law students studied records in the Tower to fit themselves for practice; he tells us that he began to study them at first for points of law, and then he became interested in them chiefly for the light which they shed on English history.

must pay, from the issue of the writ to the execution of judgment, not only in the courts of common law, but also in the Chancery, the court of Requests, the Star Chamber, the court of Wards, and several other courts.[1] Besides, it gives information as to suffering recoveries or levying fines, as to the cost of proving a will, and as to the law terms and return days. It is interesting to note that, in the author's opinion, the most crying evil of the time was the fact that counsel were in the habit of taking fees, and then never appearing to plead. He suggests that in such cases the judge should have power to order the return of the fee and damages.[2] A little later than this book, which had treated of procedure in general in a more modern style than any book that had yet appeared, we get one of the earliest of the books dealing with a special topic in procedure. In 1647 John March published, together with his book on actions for slander, a tract on the law and practice of Arbitration.

Books of this type show that the simplification of process, due partly to the action of the legislature, but chiefly to the spread of the offshoots of Trespass, was gradually making it possible to say something about actions in general. They are intermediate between the mediæval books grouped round the writs, and the modern books, which begin to appear in the following period, grouped round the orders of the courts. But this simplification of process had been accompanied by the growth in the complexity of the law of pleading. The legal profession could find the rules of pleading in the Year Books and Reports. But for daily use they also wanted precedents of pleading which they could adapt to the needs of their clients. "What availeth," says Coke, "the serjeant or apprentice the general knowledge of the laws, if he know not withall the form and order of legal proceedings in particular cases." [3] It was not long before this want was satisfied.

We have seen that, in the early days of the Year Books, the first object which the reporter had in view was the giving of instruction to pleaders; and that it was only gradually that the report and the book of precedents became distinct things.[4] Even in this period the two are found together. We have seen that Plowden considered that one of the great recommendations of his reports consisted in the fact that they contained precedents of

[1] E.g. the Council of York, the courts of the Counties Palatine, the Mayor's court, and the Sheriffs' courts in London.

[2] "I conclude with this humble request made to those who have power of reformation in this crying reigning evil amongst lawyers, touching the disappointment and defeate of Clyents causes, for which they are retayned and feed, and yet often fayle to give attendance in the houre of tribulation, or to bee nere unto the clyent in the day of visitation (a foule fault in a friend, but worse in a servant)," at p. 229.

[3] Coke's Entries, Pref.

[4] Vol. ii 537-538.



pleading upon which there had been argument and judicial decision;[1] that other reporters sometimes gave the pleadings at full length; and that Coke especially made a habit of doing so.[2] But, even in the preceding period, separate books of precedents of pleading, both in the manorial courts and courts of common law, had made their appearance. Precedents of pleading in the manorial courts were, as we have seen, contained in the little books on the Court Baron and the Court Leet, which were printed at this period.[3] Similarly, the older books of precedents of pleading in the courts of common law were printed; and newer books—the Books of Entries—began to appear, and steadily continued to increase in bulk.

The earliest of these books which has survived[4] is one published by Pynson in 1510. The Bodleian copy has no title page. It begins with the alphabetical table. But another copy, described by Dibdin, has a title page, which gives an account of the contents of the book. It contains, so runs the title, the gist of divers matters and of the pleadings in real personal and mixed actions, and also information on writs and executions.[5] The book consists of clxxxiv folios.[6] It is printed in small folio, and is therefore a very much larger work than the small tracts of the preceding period.[7] At one or two places large blanks are left;[8] and these blanks probably represent features of the MS. The matters contained therein are not arranged in any particular order. The first precedent is of an action on the statute of Labourers, and then follows Debt against executors. Probably it is a practising pleader's precedent book which has found its way to the printers. The anonymous author doubtless jotted down precedents as he acquired them, and prefixed the index to his book that he might easily find them. The Bodleian copy shows signs of use. The paging is corrected

[1] Above 371 n. 1.

[2] Above 371; below 463.

[3] Vol iv 112-113.

[4] The colophon runs—"Explicit opus excellentissimum et perutile in se continens multas materias omnibus legis hominibus perquam necessarias, *noviter impressum*, correctum, emendatum, et non minimo labore revisum, Londoniæ in vico vulgariter Flete strete nuncupato, in officina aere et impensis honesti viri Ricardi Pynson Regis Impressoris moram suam trahentis sub signo divi Georgii. Anno nostræ redemptionis M.CCCCCX Die vero ultima Mensis Februarii;" this may mean that there had been a former print, see Dibdin, Typographical Antiquities ii 442 n. (ed. 1812), or it may mean that it was printed for the first time.

[5] "Intrationum excellentissimus liber perquam necessarius omnibus legis hominibus: fere in se continens omnem medullam diversarum materiarum, ac placitorum, tam realium personalium quam mixtorum. Necnon multorum brevium tam executionum quam aliorum valde utilium illis hunc librum inspecturis aut inscrutandis."

[6] Numbered clxxxv; but the numbering is wrong as it goes straight from f. 1 to f. lii.

[7] Vol. ii 522-523.

[8] At f. cxxxvb half a leaf; at f. clxxvii, a leaf and a half.

from ff. lii-f.c, and at ff. clviii*b*-clix*a* some additional precedents are inserted in the margin.

The book is the ancestor of a long line of similar books. In 1546 "the old Book of Entries" was published[1]—so called to distinguish it from Rastell's later work. Like Pynson's book, it has an alphabetical Table prefixed; but its subject matter and arrangement show that it is a totally different collection—made, the title-page seems to tell us, by a judge. No doubt many lawyers made these collections; and the printers took any good collection which they could get. The book is anonymous;[2] but the Table is signed W.S. It is printed in small folio, and contains 244 folios. It is therefore appreciably larger than the earlier work.

In 1564—the year before his death—William Rastell[3] published his book of Entries.[4] It is a large folio of 627 leaves; and it superseded the older books, just as his abridgment of the statutes superseded the older abridgments. The reasons why it superseded the older books are to be found, not only in its size, and in the increased number of the precedents therein contained, but also in four other conspicuous merits. In the first place, the precedents were arranged under alphabetical headings after the fashion of an abridgment—a plan followed by Coke[5] and subsequent writers.[6] In the second place, it was thoroughly up to date. We shall see that it contained precedents for actions of assumpsit upon a bill of exchange.[7] In fact it was more up to date than Coke's later volume. In the third place, it was provided with notes and references. In the fourth place, the material was gathered, not only from the old printed books, but also from the most authentic source—the offices of the prothonotaries. We have seen that the prothonotaries were officials whose duty it was to enter the pleadings in an action; and that

[1] The title-page is as follows—"Intrationum liber omnibus legum Angliæ studiosis apprime necessarius in se complectens diversas formas placitorum tam realium, personalium, quam mixtorum, necnon multorum brevium tam executionum quam aliorum valde utilium, nunc tandem in gratiam studiosorum majori cura et diligentia quam ante hac revisus et emendatus, adjectis etiam Judice multo quam ante hac castigatore, cum nonnullis aliis additamentis hactenus non excussis nec editis cujusquidem Judicis ordinem series alphabetica tibi demonstrabit."

[2] On the title-page there appear the letters W. R.; this may mean that it was put together by William Rastell; as we have seen, vol. iv 311-312, William Rastell edited an earlier work on the statutes before he produced his larger book; he may well have done the same thing in this subject.

[3] Vol. iv 311.

[4] "A collection of entrees, of declaracions, barres, replicacions, reioinders, issues, verdits, judgements, executions, proces contynuances, essoynes, and divers other matters;" it should be noted that Rastell's collection, and most of the subsequent collections contained forms of judgments; a special book of judicial forms complied by G. Auxley from the MSS. of Brownlow Moyle and Smithier was published by Townsend 1674.

[5] Below 461.

[6] Below 385-386.

[7] Below 461.



therefore they and their clerks had unrivalled opportunities for accumulating a store of such precedents.[1] Rastell seems to have been the earliest writer to make use of this store of precedents.[2] He therefore produced a book of precedents in pleading of a wholly new type; and his example was copied by the numerous other books which appeared during the seventeenth century. It would be useless to enumerate all these books. A few examples will suffice.

Richard Brownlow, who made the collection of judicial writs noted above,[3] had a great reputation as one of the ablest prothonotaries of the Common Pleas. The writers of these collections knew that his name on the title page would recommend the book to the profession.[4] Thus in 1653 and 1654 two volumes of his pleadings were published; and Herne's Pleader, published in 1657, contains a collection of pleadings, "drawn entered and taken in the times of those famous Prothonotaries of the Court of Common Pleas Richard Brownlow, Robert Moyle, John Galston, and Thomas Cory." These books, being published under the Commonwealth, were in English; but in 1673 Brownlow's Pleadings were published in their original language, with the addition of some modern precedents.[5] In 1684 a collection made under the direction of Sir Thomas Robinson, late chief prothonotary of the Common Pleas, appeared. The preface tells us that, besides his own collection, the author "had the advantage of all those many curious and learned manuscripts which were collected by the long experience and critical observation of the greatest clerk of his time, Richard Brownlowe"; he had also the MSS. of Brownlow's successor, Thomas Corey, and of William Midgley, the clerk of the judgments. In 1670 W. Brown, a clerk of the Common Pleas, had, with the approbation of Sir Thomas Robinson, published from the MSS. of the prothonotaries

[1] Vol. iii 644-648, 650-653.

[2] "And understand this good reader, that al the notes and refermentes, and al that is in frenche in this booke, and al the wordes in the margent, be mine and of mye studye. But none of the declaracions, pledinges . . . and presidentes that be in latin in this booke, be of mye makinge. . . . For al them (except a fewe which I gathered together while I was a prentice of the law, Seriant and Justice) have I taken and gathered out of fower several bookes of good presidents. First the old prented booke of entrees, the seconde. a booke of presidents of matters of the comon place, dy ygentle gathered together and written by Master Edward Stubbis that was one of the prothonotaryes of the comon place, the thyrd a booke of good presidentes of matters of the kinge's benche, written and gathered bye John Lucas secundary to master William Roper prothonotary of the Kinge's benche. The fourth a booke of good presidentes which was my grandfather's Syr John More, sometime one of the justices of the Kinges bench (but not of his colleccion). And al the presidentes that be in al these fower bookes have I collected into this booke."

[3] Above 380.

[4] In Robinson's Entries Pref. he is called "the greatest clerk of his time."

[5] Brownlow, Latine Redivus.

of that court, and from the MSS. of eminent practitioners in the King's Bench, a collection of precedents suitable for both courts. In 1684 a selection of pleadings in the King's Bench, with an introduction showing the method of proceeding in that court, was published by Vidian, one of the clerks of the papers in that court.[1]

Besides these semi-official collections of pleadings, collections made by individual pleaders were also published. One example is the Liber Placitandi, published in 1674,[2] which recites that some of the precedents have received the approbation of the best pleaders of the age. When the profession of the pleader became a distinct profession, when the prothonotaries and the clerks ceased to advise upon or to draw pleadings,[3] these private collections of pleadings will gradually oust the semi-official books which held the field in the seventeenth century.[4]

The number of these collections made some kind of an index to them very necessary. This want was supplied by a book of Tables compiled by Townesend, a clerk of the Common Pleas, and published in 1667.[5] The work was continued by Cornwall. His tables were completed after his death and published in 1705.[6]

Some of these collections give, by way of introduction, short notes on procedure and pleading. But they are usually very short. An attempt was made to state the modern law of pleading under alphabetical heads in a work entitled Doctrina Placitandi,[7] written by S.E. King's serjeant,[8] and published in 1677. It is a quarto volume of 399 pages, written in law French, and containing copious references both to the Year Books and to the modern authorities. It does for the law of pleading very

[1] The Exact Pleader.

[2] Another illustration is Hansard's Entries published in 1685 with introductory observations on pleadings, and the practice of the King's Bench; the author was an attorney of Clements Inn, "where he practised as an entering clerk for several years, drawing declarations and other pleadings for attorneys in the Home circuit and elsewhere," Pref.; he knew Vidian; and the editor of this collection regards it as supplementary to Vidian's; see also Winch's Entries, "containing Declarations, informations, and other select and approved pleadings, with special verdicts and demurrers in most actions real personal and mixt . . . with references to the Book where these entries are reported," (1680); it is said in the Pref. that the original papers came to the hands of an ancient clerk of the Common Pleas, and that, after his death, the book with some additions was published with the approval of the chief prothonotary Sir Thomas Robinson.

[3] Vol. iii 651-653.

[4] It may perhaps be gathered from the preface to Vidian's Exact Pleader that there was some jealousy of these private collections felt by the clerks of the court—"Here is no sweepings of Chambers, or bundles of wast paper obtruded upon the world; but a noble collection of precedents in causes of the greatest moment."

[5] Tables to most of the printed Presidents of Pleadings, writs, and Return of Writs at the common law.

[6] Tables to the modern printed Presidents of Pleading, Writs, and Returns of Writs etc. at the common law.

[7] "Doctrina Placitandi, ou L'Art et Science De bon Pleading: Monstrant lou et en queux cases et per queux persons, Pleas, cy bien Real, come Personal ou Mixt, poient estre properment Pleades; et e converso."

[8] Sampson Ever, made King's serjeant in 1640, Foss, op. cit. vi 231.



much what Theloall's Digest did for the law as to writs. Both books explain from the cases the meaning underlying the common forms used by the practitioners, and the rules which governed the use of those forms. That it was a useful book, much studied by eminent pleaders, can be seen from the interleaved and elaborately noted copy in two parts in Lincoln's Inn Library, presented by William Garrow.[1] Garrow says, "all the written notes in this part are written by me; they were copied whilst I was a pupil with Mr. Crompton from his books, which I understood were formed by Mr. Justice Yates, augmented by Mr. Justice Ashhurst and Mr. Justice Buller, to the latter [of whom] Mr. Crompton was a pupil." It won high praise from Willes C.J.[2]

These precedents and books about pleading dealt only with cases arising in the civil jurisdiction of the courts of Common Pleas and King's Bench. In fact they covered the cases begun by original writ, and therefore corresponded to the most important of the writs dealt with in the books about writs. But just as practitioners wanted books of practice which gave information about the procedure of other courts,[3] so they wanted books which gave them information as to the theory and forms of pleading used in these other courts. We have seen that the 1618 edition of William West's Symboleography gave this information in respect of proceedings begun in the court of Star Chamber, the court of Wards, and the court of Chancery.[4] It also gave this information both with respect to revenue proceedings in the Exchequer,[5] and with respect to the criminal procedure of courts exercising criminal jurisdiction according to the forms of the common law.[6] In the latter respect it to a certain extent overlapped the sphere occupied by the books on the justices of the peace.[7]

Thus, by the end of the seventeenth century, we get the beginnings of the modern books on practice, a large number of precedents of writs, pleadings, and judgments in all courts, and books on the theory of pleading. As yet the books which deal with the civil procedure of the common law courts are the most numerous; but all the courts, criminal and civil, of law and of equity, are represented. And thus we can say that the modern types of this variety of legal literature have emerged.

[1] Solicitor-general 1812, attorney-general 1813, Baron of the Exchequer 1817-1832.

[2] "Nota: Willes C.J. said, there is more law and learning in Doctrina Placitandi than in any book he knew; that it contained the substance of all the pleadings in the Year-books and Coke's Reports," White v. Willis (1759) 2 Wils. at p. 88.

[3] Above 381.

[4] Above 162, 273-274.

[5] Symboleography (ed. 1618), Pt. ii 291-310.

[6] Ibid 86-162b.

[7] Vol. iv 113-114.

(ii) *Books concerning the land law, and conveyancing and other precedents.*

All through this period Littleton's Tenures [1] held its place as the chief work on the land law. Professor Wambaugh says [2] that "before 1628 the editions numbered more than seventy—most of them in Law French. Several of these editions were printed with wide margins for manuscript notes; and to-day every large library has copies containing annotations so voluminous as to indicate that it was not uncommon for a lawyer to use his copy of Littleton as a common place book." Coke, as we shall see,[3] pursued this plan; and his wonderful commentary, not only brought Littleton up to date, but also supplied the reader with much information upon many other branches of the law. The only other book that we need notice is, "the Profitable Book" of John Perkins [4] of the Inner Temple, which was first published in French in 1530, and republished in English in 1641 and 1657. The book deals mainly with the land law as developed by the Year Books. It is divided into the following chapters: Grants, Deeds, Feoffments, Exchanges, Dower, Tenant by the Curtesy, Surrenders, Reservations, and Conditions. In addition it contains chapters on Testaments and Devises.

We have seen that towards the end of the mediæval period the forms of conveyances and other legal documents were tending to become very much more uniform than they had been at any earlier period.[5] Naturally, during this period, these collections began to get into print. We have seen that the little books which dealt with the Court Baron and the Court Leet often contained, under the title Carta Foedi, a small selection of forms of conveyances, accompanied sometimes with short notes as to their proper use.[6] This anonymous tract is the ancestor of the many collections of conveyancing and other forms and precedents which have appeared from that day to this.

It was not long before other collections began to appear. The first of these collections by a named author is "The New Book of Presidentes" [7] by Thomas Phayre [8] published in 1543.

[1] Vol. ii 573-575.
[2] Wambaugh's Ed. of Littleton's Tenures lxi.
[3] Below 466-468.
[4] See Dict. Nat. Biog.
[5] Vol. iii 219.
[6] Vol. iv 113, 114.

[7] "A newe boke of Presidentes in maner of a Register wherein is comprehended the very trade of making all maner evydences and instrumentes of Practyse, right commodyous and necessary for every man to knowe, published by Edward Wytechurche;" it contains ff. cxviii and is printed in small quarto; at intervals it has short notes, e.g. at ff. vi a and b, xlix, lii; at f. xc b is a precedent of Letters Patent for a yearly annuity with various clauses; Phayre, who was something of a classical scholar, inserts the following marginal note—"Pardon the barbarouse latyn of al thys boke, for the common woordes of instrumentes may in no wyse be altered;" the later collectors who copied his precedents and notes did not think it worth while to copy this.

[8] He was born in Wales, educated at Oxford and Lincoln's Inn, and became crown solicitor for the Marches of Wales, Wood, Athenæ i 317.



It was a comprehensive collection of all manner of documents, including, besides conveyances, bills and answers in Chancery, letters of safe conduct, and letters of testimony. With some eloquence and some truth the author sets forth the need which existed in his own day for such collections. "Every person that can wryte and reade and entendeth to have any thynge to do amonge the common weale must of verye neede, for his owne advantage, applie his mind somewhat unto this kynde of learning. . . . It shewith the makyng of those thynges, whereupon dependeth the welth and lyvynge of men, without which thinges there can no tytle lawfullye be claymed, no landes nor houses purchased, no right recovered agaynste false usuerers, no sufficient testimonye of the actes of our auncestours, finally no man can be sure of his owne livelod without helpe of evidence which, as a trusty anker, holdeth the right of every man's possessions safely and surely agaynst al troubles and stormye tempestes of injuries, not of men only, but of time also the consumer of al." [1]

Anonymous books of a like character, sometimes merely copies of Phayre with a few additions, appeared throughout the sixteenth century.[2] A very much more elaborate work was William West's Symboleography. The first edition, published in 1590, was a collection of precedents of contracts, deeds, and other instruments, more extensive in character but similar in kind to the collections already in print.[3] But it differed from these collections in the fact that it gave information as to the principles of law applicable to these instruments, and in its method of arrangement. It was divided into four books. The first book contains a short statement of legal principles; [4] the

[1] Preface.

[2] E.g. "The Tenours and fourme of Indentures, Obligations, Quitaunces, Bylles of Paymente, Letters of Sale and Letters of Exchange, Protections, Supplications, Complayntes, A Certificate, and the Copy of save Condite" (about 1541)—a little tract of 29 precedents and xxxii ff.; at f. xxiv b there is a curious precedent of a bill of complaint to the chief justice and the chief baron and the king's judges as to a riotous assault; and there is a partnership deed in which the marriage of either of the partners is to give an option to determine the contract; another example is, "A Boke of Presidentes exactely written in manner of a register newly imprinted, augmented and corrected with addicions of diverse necessary and sundry Presidentes meete for all such persons to knowe as desire to learn the fourme and manner how to make all manner of evidentes and instrumentes," Tottel 1561; it probably first appeared in 1548, as it contains an almanack for 17 years beginning with that date; it is a larger book than the first named, and, like it, contains precedents for bills and answers in Chancery; the "Addicions" are added at the end; it is really Phayre up to date; both the arrangement of the precedents, and the notes show that it is a copy.

[3] Its full title is, "Symbolæographia which may be termed the Art, Description, or Image of Instruments, Covenants, Contracts, or the Notary or Scrivener, collected and disposed by William West of the Inner Temple Gentleman, Atturney at the Common law, in fower severall bookes;" for a short account of it see Davidson, Precedents in Conveyancing (3rd ed.) 10-11.

[4] Wood, Civil Law (ed. 1730) 86 says that he got his dissertation on contracts and obligations from Hermannus Vultejus, whose work he translated and epitomized.

second and the longest, a collection of many different kinds of instruments in a sort of alphabetical order; the third, testamentary documents, presentations, and documents connected with arbitrations; and the fourth, documents relating to copyholds. The second edition, published in two parts in 1594, was much enlarged; and it was successful, as another edition was called for in 1597. The first part contains the introduction wholly rewritten, and the subject matter of the three books of the first edition, except the sections dealing with arbitrations. The second part deals with judicial or semi-judicial precedents—arbitrations, fines, recoveries, indictments, and precedents connected with the equitable jurisdiction, together with a short account of that jurisdiction.[1] In 1615 precedents connected with merchants' affairs were added to the first part; and in 1618 precedents of pleadings in the Exchequer, and the courts of Star Chamber and Wards and Liveries, were added to the second part.[2]

It is only the first part of the book which contains conveyancing precedents; and these are still mixed up with other miscellaneous documents. Thus in the 1615 edition there is inserted a precedent of the "covenants of marriage of a king,"[3] many miscellaneous precedents of recognizances,[4] grants of incorporation of towns,[5] and many miscellaneous warrants.[6] But the separation which West made between the two parts of his book shows that the need for some kind of classification was beginning to be felt. A book published in 1650, and entitled, "the Perfect Conveyancer," brings us a step nearer to a collection of purely conveyancing precedents.[7] In the first part there are a few miscellaneous documents;[8] but that part is mainly, and the second part is wholly, concerned with the forms of conveyances and contracts.

The growth in size and elaboration of these books of precedents shows that the law of conveyancing was becoming a very difficult art. Besides these collections of precedents, a book was wanted to teach the practitioner how to use them.[9] This want was

[1] Above 273-274; in 1597 the order was slightly changed—fines and recoveries were put first, and arbitrations were put after indictments; last came the chapter on equity; otherwise the book was substantially reprinted.

[2] The order of 1597 was retained, but in all cases, except in that of recoveries, the number of precedents is slightly enlarged.

[3] § 83. [4] §§ 103, 104. [5] §§ 390-391. [6] §§ 570-581.

[7] "The Perfect Conveyancer, or several select and choice Presidentes collected by four severall sages of the law, Edward Henden late one of the Barons of the Exchequer, William Noy Attourney Generall to his late Majestie, Robert Mason sometime Recorder of London, Henry Fleetwood formerly Reader of Grayes Inn."

[8] E.g. an obligation of collectors of Subsidies to the king, at p. 244; a grant of catalla felonum, at p. 246; a retainer of a chaplain by a nobleman, at p. 255; an award of Serjeant Henden, at p. 269.

[9] Shepherd in his preface says that untrained attorneys and "lawless scriveners," with the help of a few precedents, take upon themselves to advise on titles—"they



supplied by "The Touchstone of Common Assurances." It was published in 1641, and contains twenty-four chapters. The following passage from Shepherd's Preface very fairly describes its character: "I have herein set forth, under certain general titles or common places, the greatest parts of the judgments, statutes, resolutions, and cases that do contain or concern the learning of the Common Assurances of the Kingdom; so as I think I may truly say . . . that there are few material things, as touching this subject, to be found anywhere dispersed in the volumes of the law, but they are to be found somewhere herein."

The book came out under the name of William Shepherd [1]—an industrious writer of many miscellaneous law books. Some of these books were large and ambitious, but not very successful. Instances are his two books on conveyancing, which he published in the latter half of the seventeenth century.[2] Some were pioneer treatises in which he struck out a new line which was later followed by other writers. Instances are his two abridgments,[3] and a little book on Corporations, Fraternities and Guilds.[4] Some were textbooks for students and practitioners, and at least one of these had some measure of success.[5] Shepherd, besides being a prolific writer of law books, was a whole-hearted supporter of the Commonwealth and its measures of law reform;[6] and no doubt this had something to do with the obscurity into which he and most of his books fell after the Restoration. The Touchstone for some time shared this fate.[7] But its intrinsic merits, and the appreciation of Willes C.J., rescued it from obscurity.[8] But there is reason to think that these merits were due to the fact that its author was not Shepherd but Sir John Dodderidge.[9] The internal evidence of style and method of treatment makes it probable that the book was not written by Shepherd; and there is good second-

may perhaps have some law books in their houses, but never read more law than is on the backside of Littleton."

[1] See Dict. Nat. Biog.

[2] "The Law of Common Assurances touching Deeds in Generall" (1669); it is an enlarged edition of the second half of the Touchstone with a selection of 763 illustrative cases at the end; he tells us that the first part of the book perished in the fire of London; but he rewrote it, and published it in 1671 under the title of "The Practical Counsellor at Law touching Fines Recoveries, etc."

[3] See L.Q.R. xxxix 35; above 377.

[4] "Of Corporations, Fraternities and Guilds, or a discourse wherein the learning of the law touching Bodies Politique is unfolded" (1659).

[5] Below 397.

[6] "England's Balm, or Proposals by way of Grievance and Remedy Humbly presented to His Highness and the Parliament towards the Regulation of the Law and better administration of Justice" (1657); as to this book and its proposals see vol. i 430; vol. vi 421-422.

[7] "For a long time the Touchstone lay on the stalls of the second-hand booksellers in Moorfields unnoticed and of no repute," Pref. to the fourth edition by Edward Hilliard.

[8] Ibid; see Roe d. Wilkinson v. Tranmer (1757) 2 Wils. at p. 78.

[9] For Dodderidge see above 345.

hand evidence that Shepherd, having purchased Dodderidge's library, acquired the MS. of this treatise which he published as his own.[1] If this is true, Shepherd's sharp practice has had some measure of success. It has connected his name with a book which is not only the earliest work exclusively devoted to the theory of conveyancing, but also a work which is still regarded as a high authority upon this subject.

(iii) *Books concerning criminal law and the law of tort.*

The books which deal with the jurisdiction of the justices of the peace necessarily contained much information upon criminal law and procedure;[2] and the section of the second part of West's book,[3] which deals with precedents of indictments and other instruments connected with the administration of the criminal law, contains by way of introduction a short description of the law substantive and adjective.[4] In addition there are two books exclusively devoted to this subject. Staunford (1509-1558), who was made judge of the common pleas in 1554, wrote a book on the pleas of the crown, which was posthumously published in 1560.[5] He was a learned lawyer; and is said to have edited the earliest printed edition of Glanvil.[6] He certainly makes much use of Bracton's work, which had not then been printed.[7] His treatise is divided into three books. The first deals with various offences; the second with jurisdiction, appeals, indictments, and defences; and the third with methods of trial, and the consequences of conviction. It is founded almost entirely upon Bracton and the Year Books. A more comprehensive and up to date book was the "De Pace Regis et Regni" of Ferdinando Pulton,[8] which was published in 1609.[9] It is at times discursive—thus in the chapter

[1] See the Preface to the fourth edition; Booth (the author of the book on Real Actions) says that Shepherd purchased Dodderidge's library, and that among his books was the MS. of this treatise which Shepherd published as his own; Booth got this information from Pigott, who got it from Levinz, who had seen the MS. in Dodderidge's possession; Preston in his edition of the Touchstone accepts this evidence as conclusive; R. W. Bridgman, Legal Bibliography 344, disputes this theory on the ground that, though Dodderidge died in 1628, the year Co. Litt. was published, there are many references to that work; but it is possible that Dodderidge saw Coke's work in MS. and that Shepherd inserted the references.

[2] Vol. iv 115-119. [3] Above 390.

[4] Symboleography (ed. 1618), Pt. II. 86-96; the actual precedents, ibid 96-162b, are arranged alphabetically.

[5] "Les Plees del Coron: divisees in plusieurs titles et common lieux."

[6] Dict. Nat. Biog. [7] Above 378 n. 10.

[8] Vol. iv 309-10, 312-313.

[9] "De Pace Regis et Regni. A Treatise declaring which be the great and generall Offences of the Realme, and the chiefe impediments of the peace of the King and Kingdome. . . . Collected out of the Reports of the Common Lawes of this Realme, and of the Statutes in force, and out of the painfull workes of the Reverend Judges Sir Anthonie Fitzharbert, Sir Robert Brooke, Sir William Stanford, Sir James Dyer, Sir Edward Coke, Knights, and other learned writers of our Lawes."



on oppression he gives a long account of the law of waste.[1] But it is comprehensive and well arranged. A comparison between its forty-one chapters and Staunford's work enables us to appreciate the effect of the additions to and alterations of the criminal law made during this period, both by the legislature, and by the judges of the common law courts and of the court of Star Chamber.

There is only one book written during this period which is exclusively devoted to the law of tort. That is John March's little book on actions for slander, published in 1647.[2] Actions for slander had long figured prominently in the reports; and this book is an able attempt to extract some general principles from the cases. As is to be expected at a period when a comparatively new legal topic is only just beginning to acquire a separate form, the writer sometimes diverges to other subjects. Thus he discusses the question when a man's suit will expose him to an action; and in that connection he has something to say about malicious prosecution. We must wait some time for more books on special branches of the law of tort, or on the law of tort as a whole. As yet the practitioner or student gathered his information by searching the reports, abridgments, or indices under such entries as Detinue, Trespass, Deceit, or Case. This branch of the law is as yet very much implicated in the forms of action.

(iv) *The lectures of Readers, textbooks, students' books, and law dictionaries.*

During this period the lectures of the Readers of the Inns of Court[3] on many different branches of the law, old and new, still formed an important part of the education of the law student. Of their merits it is difficult to judge. Comparatively few out of the many that exist in MS. have as yet found their way into print; and it is probable that many of these were never regularly reduced to writing by their authors.[4] But we shall see that there was probably some deterioration in their quality at the latter part of this period,[5] and a tendency to replace them by the study

[1] Op. cit. 94b-97b.

[2] "Actions for Slander. A Methodical Collection under certain grounds and heads of what words are actionable in the law and what not."

[3] Vol. ii 506-507.

[4] Moore's Reading on 43 Eliz. is stated specially to have been "abridged by himself," below 395 n. 4; in S.P. Dom. 1639-1640 485-486, ccccxlvi 25 there is a mention of a Reading by Mr. Jones of Lincoln's Inn who "did touch upon many points of honour, amongst the which it was questioned what honour was due to Secretaries of State by right or favour, as also whether they have any place *de jure* in the Upper House of Parliament. Messrs. Bates and Tailer having undertaken to argue it, concluded that they had no place in the Upper House, unless made barons or called by writ."

[5] Vol. vi 482.

of the many short books upon various legal topics which were then beginning to appear.

It seems to have been usual—certainly from the sixteenth century onwards—that the readings should be on some selected statute or part of a statute.[1] Roger North[2] assumes that this was so, and laments the decay of readings, mainly because lawyers and litigants were thus deprived of an authoritative interpretation of new statutes. But it was not an invariable rule that the readings should be on statutes—instances to the contrary are Calthorpe's reading on Copyholds, and Dodderidge's Reading on Advowsons.

A list of such of the Readings as are known to exist in print or MS., taken from Part II. of Brooke's Bibliotheca Legum Angliæ, will be found in the Appendix.[3] Here I shall simply enumerate in the order of their publication one or two of the printed readings which I have seen.

In 1630, some readings by Dodderidge on advowsons, delivered at New Inn, were published under the title of "A compleat Parson;"[4] and in 1635 a reading by Calthorpe on the relation between the lord of the manor and his copyholders.[5] In 1642 appeared a fragment of Bacon's famous reading on the statute of Uses;[6] in 1647 Brooke's readings on Henry VIII.'s statute of limitations, and on c. 17 of Magna Carta;[7] in 1648 the readings of Dyer on Henry VIII.'s statutes of wills, of Brograve[8] on the

[1] Vol. ii 506 and n. 6.

[2] Lives of the Norths, i 98, 99—"It was the design of these readers to explain to the students the constructions that were to be made upon new statutes, for clearing a way that counsel might advise safely upon them. And the method of their reading was to raise all imaginable scruples upon the design, penning, and sense of such new Acts as they chose out to read upon, and then to give a careful resolution of them. . . . But now there is scarce a lawyer so hardy to advise a client to try a point upon a new statute whereof the event is at the peril of costs, and sometimes ruin of a poor man that pays for the experiment. . . . Probably a single judge at the assizes would not have opposed his sentiment against the learned determination of a reader so solemnly and publicly held forth (as at these exercises in the inns of court is done), which counsel at the bar in nice questions at law are allowed to appeal to for authority."

[3] App. II.

[4] "A compleat Parson, or a description of Advowsons or church livings . . . delivered at severall readings at New Inne 1602, 1603, and now published for the common good."

[5] "The Relation between the lord of a manor and the copyholders his tenants, delivered in the learned readings of Charles Calthorpe."

[6] Works (Ed. Spedding) vii 391-450; it was a double reading delivered in the Lent Vacation 1600; an edition with elaborate comments was published by Rowe in 1804.

[7] This Reading deals with points in the criminal law; the title-page reads c. *16*, but the first page reads c. *17*, which is obviously right.

[8] In a paper in the State Paper Office, probably of the year 1579, printed in Inner Temple Records i 470-473, a description is given of the Readers and Chief Barristers of the Inns of Court; Brograve is described as, "very lerned, pore, smaly practised, worthie of greate practice."



clauses of the statute of Uses relating to jointures, and of Risden on Henry VI.'s statute of forcible entries;[1] in 1656 the reading of Stone on Elizabeth's statute of bankrupts;[2] in 1662 the reading of Denshall on Henry VII.'s statute of Fines;[3] in 1676 the reading of Francis Moore on Charitable uses;[4] in 1680 a reading by Thomas Williams on the statute 35 Henry VIII. c. 6 dealing with certain points connected with trials by jury,[5] and a reading by Risden on the statute of 21 Henry VIII. c. 19 dealing with avowries;[6] and in 1681 a reading of Sir Robert Holbourne on Edward III.'s statute of treasons.[7] In 1791 there was published, in the Collectanea Juridica, a reading by Serjeant Carthew at New Inn in 1692 on two points arising on the statute of Uses.[8]

Some of these readings consist simply of the statute, and of certain conclusions as to the effect of the statute, which were no doubt debated by the Reader and his auditors.[9] Some, for instance Calthorpe's and Moore's readings, give a clear and sensible summary of the subject chosen. But many of these printed versions look as if they came from short notes taken by listeners, not always very intelligently.[10] It would be unjust to their authors if we were to suppose that the printed version contains all that they said, or that they always made the statements attributed to them. It is very rare to find any authorities cited, or any sort of discussion of legal principles. The only reading which is really illuminating is Bacon's unfinished reading on the statute of Uses. His wide intellectual outlook and gift of style,

[1] Printed in one volume entitled, "Three Learned Readings;" this Risden was Reader 1570, 1571, 1574-1575, 1577, 1578, Calendar of Inner Temple Records i 256, 259, 279, 289, 313.

[2] "The Reading on the Statute 13 Eliz. c. 7 touching Bankrupts;" it consists of an Introduction and an enumeration of points for discussion, and then of six divisions in which the cases are discussed; it is followed by a case set for New Inn, and twelve short divisions on it.

[3] "Le Reading del Monsieur Denshall sur l'estatute de Finibus fait anno 4 H. 7;" there are six lectures.

[4] Printed at the end of the "Law of Charitable Trusts" by G. Duke (1676); it is stated to be an exact copy of the original under the author's hand, and it is certainly far fuller than any of the other readings, except Bacon's; another small book on this topic was published by J. Herne in 1664, designed to help those who served on the commissions appointed under Elizabeth's statute, vol. iv 398.

[5] As to this work see vol. iv 260-261.

[6] To be distinguished from the Risden who read on the statute of forcible entries, above n. 1; this Risden was called in 1595, Calendar of Inner Temple Records i 404, and became Reader in 1612, ibid ii 66.

[7] Consisting only of three short lectures. Coke's Readings are dealt with below 460.

[8] Collect. Jurid. i 369-377—it is a thin production.

[9] E.g. the readings of Williams and Risden published in 1680.

[10] Thus in Dyer's reading we find at p. 6 the following proposition—"A man hath two wives, and he deviseth his land to his latter wife in fee, the first wife shall have it!"—law students sometimes make curious stuff of their teachers' lectures.

united to his complete mastery of the technical rules of the common law, gave him the power to state and explain and criticise its rules in a manner comprehensible to a student and illuminating to a lawyer. We have already seen how great a light it sheds, not only on the statute, but also on the history of Uses.[1] Here we may note that in it he rejected the "conceit of scintilla juris"[2]—it was only natural that he should be opposed to a doctrine of this kind, which savoured of the scholasticism which he had spent his philosophical career in combating.[3] This one reading gives him a place beside those few great teachers who have appeared at infrequent intervals in the history of English law—beside men like Blackstone and Maitland.

The growth, at the latter part of this period, of short textbooks upon many various legal topics, is striking. The earliest of these textbooks—Littleton's Tenures[4]—was also a student's book; and most of the textbooks of this period were written as much for students as for practitioners. But, towards the end of this period, we get a distinction between the textbooks on specific legal topics, and books of Institutes which were designed to give information upon the underlying principles of the law as a whole, and a short view of its most important rules.

During the sixteenth century the textbooks follow very closely the precedent set by Littleton. A book published in 1542 by Rychard Bankes, and entitled in the first edition, "The principall lawes and statutes of Englande,"[5] and in the later editions, "Institutions or principall groundes of the lawes and statutes of England,"[6] is concerned almost entirely with the land law; and we have seen that the same topic fills much the largest part of Perkins' Profitable book.[7] It is not till the following century that we get books written on other legal topics. In 1632 we have a curious work in five books on Women's Laws.[8] The first

[1] Vol. iv 410 seqq.

[2] Reading on the Statutes of Uses, Works (Ed. Spedding) vii 428.

[3] J. E. G. de Montmorency, Francis Bacon, in Great Jurists of the World (Continental Legal History Series) 163.

[4] Vol. ii 573-575.

[5] "The Principall lawes and statutes of Englande whyche be at thys present day in ure compendiously gathered together for the weale and benefit of the Kynges Majesties most lovyng subjectes, now recognized and augmented;" this looks as if there was an earlier edition, but I have not come across one.

[6] The later editions of the sixteenth and first quarter of the seventeenth centuries profess to be corrected and augmented, but there is very little difference between them.

[7] Above 388.

[8] "The Lawes Resolutions of Women's Rights: or the Lawes Provision for Women. A Methodicall Collection of such Statutes and Customes, with the Cases, Opinions, Arguments and points of Learning in the Law as doe properly concerne Women;" the editor's preface tells us that the book was by an unknown author, and that he, having a copy, had corrected and published it.



book, after some introductory matter, deals mainly with wardship and coparcenary; the second with marriage curtesy and dower; the third with the law as to the relations, personal and proprietary, between husband and wife; the fourth with the rights of widows; and the fifth with the manner in which a woman was protected by the criminal law. We have seen that in 1647 John March published a useful little book on actions for slander,[1] which reached a second edition in 1674.[2] In 1651 William Shepherd published a short book on common law procedure, and a still shorter account of the cases in which equitable relief might be obtained.[3] In 1655 he published a short book on conveyancing,[4] which was the most successful of his books. Perhaps this was due to the fact that he had the Touchstone to draw upon.[5] However that may be, in spite of many rivals in this period and the next,[6] it held its ground, and editions of it were published as late as 1822 and 1825.

Of books written about law to instruct students as to the kind of knowledge which they ought to acquire, and the best method of acquiring it, the most notable, written by a common lawyer, is Dodderidge's "English Lawyer."[7] English lawyers, he says, are not, as is sometimes alleged, a learned race of unlearned men.[8] Nor would they be good lawyers if they were; for, "the study of the Lawes must of necessity stretch out her hand and crave to be holpen and assisted almost by all other sciences."[9] He goes on to show the need for a knowledge of such sciences as logic and etymology, illustrating his points by reference to rules of English law. Then, in the second part of the book, he gives

[1] Above 393.

[2] Term Catalogues i 165.

[3] "The Faithful Councillor, or the Marrow of the law in English: the 1st part showing how actions may be laid for relief in most cases of wrongs done: the 2nd part in what cases relief is to be had in Chancery;" a good deal of law is grouped round the forms of action, epecially the actions on the case.

[4] "The President of Presidentes: an abstract of the general learning and forms of Presidents relating to all manner of Presidents now in use."

[5] See Davidson, Precedents in Conveyancing (3rd ed.) 11.

[6] The Exact Clerk (1656); a book by Herne (1658), said to have come from the MS. of an eminent conveyancer, also contains directions how to sue out and prosecute writs; a tract on particular estates by Dodderidge, and Observations concerning a deed of feoffment by Gent, both published with Noy's maxims, below 399, in 1642; for books of the following period see vol. vi 603-605.

[7] "The English lawyer, describing a method for the managing of the lawes of this land, and expressing the best qualities requisite in the student, practizer, judges, and fathers of the same;" a book called "the Lawyers Light—a due direction for the study of the law" (1629), is simply the second part of the "English Lawyer" (there entitled methodus studendi) printed separately; it was bound up with another short tract for students called "Use of the Law," attributed (probably falsely) to Bacon, see Bacon's Works (Spedding's Ed.) vii 453-457.

[8] "The profession of our law hath now and formerly had great numbers of students that have had as long and as ample institution in those sciences called liberall as any of them," at p. 33.

[9] At p. 35.

some advice as to the best methods of study, and some information as to the sources and principles of the law.[1] There was a good deal in the book which was perhaps regarded as too general to be of much service to the student, who in that age, as in this, has usually a pretty shrewd, if somewhat shortsighted idea as to the sort of information which will pay; and the more practical part, on the sources and principles of the law, was quite as well if not better done in books of a new type suggested by Bacon.

We shall see that Bacon put forward a scheme for the restatement of English law; and that, as part of the scheme, there was to be written a book "De regulis Juris," in which the leading maxims of the law were to be set out, with explanations and illustrations.[2] Bacon's tract on the "Maxims of the law," written in 1596, is a fragment of such a work.[3] It contains a good deal of law in the form of a commentary upon twenty-five maxims illustrated by cases and statutes.[4] No doubt the information conveyed is scattered; but the whole work is a good exercise, both in reducing various different rules to some sort of principle, and in ascertaining the limits of the principles themselves.[5] Bacon meant this work to be distinct from the book of Institutes which he proposed;[6] and, indeed, it is not well suited to any but the advanced students or the practitioners for whom it was intended.[7] But the writers of students' books of this period seem

[1] Note at p. 241 a defence of case law. [2] Below 488.

[3] Works, Ed. Spedding vii 309-387; for the circumstances of its publication, and the relation of the MSS. see ibid 309-311; probably the fragment was finished and dedicated to the Queen in consequence of the debate in Parliament as to the reformation of the law in 35 Elizabeth; in the Preface Bacon says that he has collected 300 maxims, but, "I thought good, before I brought them all into form, to publish some few."

[4] "There is one point above all the rest I account the most material for making these rules indeed profitable and instructing; which is, that they be not set down alone, like short dark oracles . . . but I have attended them . . . with a clear and perspicuous exposition; breaking them into cases, and opening their sense and use, and limiting them with distinctions," Pref. 323; indeed it may be said that Bacon anticipated Macaulay's use of illustrations to explain his penal code.

[5] Bacon says, Pref. 319—"I do not find that . . . I can in any kind confer so profitable an addition unto that science, as by collecting the rules and grounds dispersed throughout the body of the same laws; for hereby no small light will be given, in new cases and such wherein there is no direct authority, to sound into the true conceit of law by depth of reason; in cases wherein the authorities do square and vary to confirm the law and to make it received one way; and in cases wherein the law is cleared by authority, yet nevertheless to see more profoundly into the reason of such judgments and ruled cases, and thereby to make more use of them for the decision of other cases, more doubtful; so that the uncertainty of law, which is the principal and most just challenge that is made to the laws of our nation at this time, will by this new strength laid to the foundation somewhat the more settle and be corrected."

[6] Below 488.

[7] This is reasonably clear from the Preface; he meant, he said, to correct two common and contrary faults—"There be two contrary faults and extremities in the debating and sifting out of the law, which may be noted in two several manner of arguments; some argue upon general grounds, and come not near the point in



to have thought that information of this kind would make a good introduction to an Institutional book. It influenced Dodderidge's book which has just been discussed; and Noy's little tract on the "Principall Grounds and Maximes of the Lawes of the Kingdome."[1] More especially it influenced what was much the most complete and the best institutional book before Blackstone—Henry Finch's "Nomotechnia," or description of the common law of England.[2] It was first published in law French in 1613; it was translated and rearranged by the author, and published posthumously in 1627; and other editions were called for in 1636, 1678, and 1759.[3]

Finch, like Bacon, recognized the need for a book of Institutes, and appreciated the principles upon which it ought to be written. He saw that the little books, which followed Littleton and the Natura Brevium, and merely gave information about the land law and writs, would no longer suffice. "He that will take the whole body of the law before him, and go really and judicially to work, must not lay the foundation of his building in estates, tenures, the gist of writs and such like, but on those current and sound principles which our books are full of." Both in the French and the English version the treatise is divided into four books; and the subject matter of the first book is the same; but the arrangement of the other three books is very different in these two versions. The English version is the product of second thoughts, and a great improvement upon the French; and, as it is obviously the version which has influenced subsequent writers, it is the one which I shall describe.[4]

In the first book, after a few remarks about the law of nature

question; others, without laying any foundation of a ground or difference or reason, do loosely put cases, which, though they go near the point, yet being put so scattered, prove not; but rather serve to make the law appear more doubtful than to make it plain," at pp. 320-321.

[1] Published in 1642; a much more elaborate work on the same lines is Edward Wingate's Maximes of Reason (1658); it contains 214 maxims; some are from theology, grammar, and logic, but most are legal principles in the form of maxims; it is less useful than the other books because it is more elaborate.

[2] "NOMOTEXNIA, cest-a-scavoir un description del commen leys Dangleterre solonque les rules del Art. Parallelees ove les Prerogatives le Roy. Ovesque auxy le substance et effect de les Estatutes (disposes en lour propre lieux) per le quels le Common Ley est abridge, enlarge, ou ascunment alter, del commencement de Magna Charta fait 9 H. 3 tanque a cest jour;" for Finch see above 343.

[3] The last edition is by Danby Pickering.

[4] In the French edition the law as to criminal and civil wrongs is inserted before the law as to property; the law of actions forms the third book and is differently arranged, dealing with writs, pleading, trial by jury, demurrer, process, execution, pleas of the crown, common pleas, the various forms of action, writs of error, local courts and officials, the justices in eyre and of oyer and terminer, arbitration; the fourth book deals with bodies of law outside the common law, i.e. the law administered in the court of the Constable and Marshall, the Admiralty, and the ecclesiastical courts; these bodies of law are discussed mainly in their relations to the common law.

and the law of reason, he deals with "rules taken from other learnings"—from religion, grammar, logic, natural philosophy, politics, and morality. He then deals with the principles of legal construction which are either natural or feigned. Finally he deals with the positive laws made by the state by the light of the laws of nature or reason. The second book begins by explaining what is the common law, and of what it consists. It explains how the country is divided, and the different kinds of persons natural and artificial which make up the state. In this connection he gives by far the best description of the king and his prerogative which had yet been written—a description upon which Blackstone's better known account is based. He then passes to the substantive law which he says consists of two main divisions—"one that concerneth possessions, the other the punishment of offences." First of all the methods of acquiring possessions are detailed, and the distinction between things in possession and in action is explained. In this, as in other parts of the book, he describes separately the common law, the statutes, and the exceptional rules which applied to the king by virtue of his prerogative. He then passes on to hereditaments, and describes the different kinds of estates known to the law. After dealing with land and tenements, he passes on to incorporeal things such as advowsons, seigniories, rents, commons, villeins, annuities, corrodies, offices, and franchises. He then defines chattels in general, and deals with the law of wills and executors and administrators. After distinguishing chattels real from chattels personal, he discusses the modes by which the latter are acquired; and in that connection deals with bailment and contracts. He closes the book with a short account of accord and arbitrament. The third book is taken up with an account of different forms of wrong doing, civil and criminal. It is the shortest of the four. The fourth and longest book is taken up with the law of actions. He deals with the courts, their times of sitting, their officers, and their records; with original writs and the various forms of action; with commissions, plaints, bills, inquests of office for the king, and indictments; with process and pleading and joinder of issue; with trial by jury, by battle, by witnesses, and by compurgation; with demurrers; with other incidents of a law suit such as appearance, mesne process, continuance, judgments, writs to execute judgment, writs of error and false judgment; and finally with certain other writs having no relation to an action.

Finch's book is a pioneer book of the institutes of English law. It is well arranged, and tersely and clearly written. It has influenced all succeeding books of a similar sort; for, as the summary which I have just given shows, it influenced the form



and arrangement of Blackstone's Commentaries; and, through Blackstone's Commentaries, the form and arrangement of the chief institutional book of English law at the present day. But it never attained the fame or the influence of its successor; and this I think is due to the following causes: In the first place the author, though a man of some literary gifts and equipment, was pre-eminently a practising common lawyer. In his introduction he follows the plan of illustrating the principles of English law by instances of so technical a character, that only an advanced student could understand them. In the second place his outlook is towards the past rather than towards the future. He gives a very large space to the land law and the real actions, a very small place to those developments of trespass which were creating a law of contract and a law of tort, and no place at all to commercial law which, when he was writing, was rapidly becoming a new department of the common law.[1] It followed therefore that the changes of the latter part of the century made some parts of his book useless and other parts inadequate. In the third place it deals only with the common law. The references to equitable rules are of the slightest; and in the following period, when the system of equity began to expand, this caused his book to be a very one-sided view of the English legal system. No doubt some of these defects were inevitable. It was an age of great and rapid change; and such an age is not so favourable to the composition of a book of Institutes as the calm atmosphere of the age in which Blackstone wrote. The result is that, partly from its own character, partly from the character of the age, the book has influenced, not so much the students and the lawyers of the age for which it was written, as the succeeding writers of similar books. Though its direct influence is incomparably less than Blackstone's Commentaries, its indirect influence has, through Blackstone, been very considerable.

The last of the books which I must notice under this head are two law dictionaries, the one written by a common lawyer, and the other by Spelman, the historian and antiquary. The first of these is the "Exposiciones Terminorum Legum Anglorum" published by John Rastell in 1527. It is a short book, but it was very successful. It was translated by the author's son William; and editions under the short title of "Termes de la Ley" were published in 1567, 1579, 1592, 1595, 1602, 1641, and 1667.[2] But by 1667 it had been superseded by similar works of a more elaborate kind. I have already dealt with the

[1] Above 143-148.

[2] The full title of the edition of 1592 is, "An Exposition of certaine difficult and obscure words and termes of the Lawes of this Realme"; it is printed both in French and English.

Interpreter of the civilian Cowell. The Interpreter was a much more elaborate work than Rastell's, and we have seen that it long continued to be the standard Law Dictionary.[1] But, for the study of legal and other kinds of history, it was superseded by Spelman's Glossary,[2] which he undertook by way of preparation for a work on the origins of English law. The first part was published in 1626, and the second (posthumously) in 1664. It is a great deal more than a law dictionary, being a dictionary of Latin and other words to be found in all the post-classical authors and documents English and foreign. On the other hand, it did not contain some of the technical terms and phrases which an English lawyer would naturally expect to find.[3] In fact it is a product of that new school of historians and historically minded lawyers of which I must now speak.

(v) *Books upon constitutional law and legal history.*

"The first half of the seventeenth century," said Maitland, "may be regarded as the heroic age of English legal scholarship."[4] The literary Renaissance of the Elizabethan age had touched the studies of law and history, and many scholars were working with the enthusiasm of explorers to put them upon a new basis. We can see the central figures of this revival in the band of poets, historians, and lawyers who formed the Antiquarian Society. Among them were to be found such men as Camden, Clarendon, Bacon, Selden, Spelman, D'Ewes, Eliot, and many others whose names are well known in law, politics, and literature; and the greatest antiquary and collector of books and manuscripts of the period—Sir Robert Cotton. The achievements of all the distinguished literary men of this period in all departments of learning owed much to Cotton's advice, personal assistance, and generous loans of books and manuscripts.[5] But it is probable that the work done in the departments of English law and history owes most to him; for it was the records collected in his famous library that facilitated the formation of this new school of lawyers and historians. And in the seventeenth century much depended upon the labours of this school. "Great questions were opening, and on all sides an appeal was being made to ancient law and ancient history."[1] With the help of Cotton, some of these men forged the weapons with which the battle of the constitution was won, created our modern methods and standards of historical research, and, by raising the intellectual level of the legal profession, helped the common law to assert and to maintain its supremacy in the state. Of the work which they did in the department of constitutional law I shall speak later.[2] Here I can only describe briefly the literary work and influence of one or two of the most famous of these historically minded lawyers.

Of William Lambard and his work upon different branches of constitutional law I have already spoken.[3] I must here mention the contribution which he made to legal history by his edition of the Anglo-Saxon Laws. Considering that he was "a pioneer in an unknown land,"[4] his work was, in Dr. Liebermann's opinion, good. At a time when so much was thought to turn upon the character of our early laws and institutions, it was obviously desirable that men should have access to a printed copy of the earliest laws. Another pioneer in this new field of learning was Somner (1598-1669),[5] an ecclesiastical lawyer and the son of an ecclesiastical lawyer. He at first helped his father, who was registrar to the court of Canterbury, and was created by Laud registrar of the ecclesiastical courts of the diocese. He was an enthusiastic loyalist; and, after the Restoration, became Master of St. John's hospital at Canterbury. His work was done in the allied departments of Anglo-Saxon language and literature, and the antiquities of our legal history. In the first of these departments he wrote some observations on the Laws of Henry I., translated (but did not publish) Lambard's Latin text of the Anglo-Saxon Laws, and translated Anglo-Saxon documents for Dugdale's Monasticon, besides giving other assistance in the preparation of that work.[6] His most important work was his Saxon-Latin-English Dictionary,[7] to help in the publication of which John Spelman gave him the income of the Anglo-Saxon lectureship, which his father Henry Spelman had founded at Cambridge. In the second of these departments his most important

[1] Above 22.

[2] "Glossarium Archaiologicum continens Latino-Barbara, peregrina, obsoleta et novatæ significationis vocabula; quæ post labefactatas a Gothis Vandalisque res Europæas, in Ecclesiasticis profanisque Scriptoribus; variarum item Gentium legibus antiquis, Chartis, et Formulis occurrunt. Scholiis et Commentariis illustrata; in quibus prisci Ritus quamplurimi magistratus, dignitates, munera, officia, mores, leges ipsae, et consuetudines enarrantur."

[3] For the later work by Blount see vol. vi 612.

[4] The Laws of the Anglo-Saxons, Collected Works iii 453.

[5] Forster, Life of Sir John Eliot i 241-242; for instance D'Ewes, Autobiography (Ed. Halliwell) ii 38, says—"I borrowed many precious manuscripts of him, being chiefly led, out of a virtuous emulation of him at the first, to the study of records, and to the treasuring and storing up of ancient coins, and elder or later manuscripts or autographs, as well as original letters of state, as old deeds and writings."

[1] Maitland, Collected Works iii 453.

[2] Vol. vi 84-86, 88-103.

[3] Vol. iv 117-118.

[4] Maitland, Collected Works iii 452.

[5] Dict. Nat. Biog.

[6] See ibid for one or two other works.

[7] "Dictionarium Saxonico-Latino-Anglicum, voces phrasesque præcipuas Anglo-Saxonicas . . . cum Latina et Anglica vocum interpretatione complectens . . . Accesserunt Œlfrici Abbatis Grammatica Latino-Saxonica cum glossario suo ejusdum generis;" first Ed. 1659; in 1652 he had contributed to Twysden's Ed. of "Historiæ Anglicanæ Scriptores Decem," a glossary of obscure and old words.

work was his Treatise of Gavelkind.[1] Lambard had printed and translated a version of the Kentish customs in his Perambulation of Kent; and had given a short account of some of the points mentioned in the custumal.[2] Somner's aim was to give a fuller account of the origins both of the name and the thing. He did not intend it to be a law book, but rather a help to the proper understanding of the law on this topic.[3] In one place he goes beyond the limitations of his subject, and gives an interesting historical disquisition on an important point in the history of the law of succession to chattels.[4]

Spelman (1564?-1641),[5] though a student of Lincoln's Inn, was never a professional lawyer. His chief work was done in the sphere of ecclesiastical history; but, both his Glossary and his tract on tenures by knight service are books of first-rate importance in our legal history. The first was, as we have seen,[6] the earliest dictionary of early legal and historical terms constructed upon sound principles, and both helped Wright and Blackstone to give an orderly exposition of the rules of the land law.[7] Like Lambard and Somner, he was an Anglo-Saxon scholar, and, as we have seen, founded a shortlived Anglo-Saxon lectureship at Cambridge,[8] the revenues of which were ultimately devoted to assisting Somner to complete his Anglo-Saxon Dictionary.

D'Ewes, whose autobiography,[9] with its sometimes malicious comments on his contemporaries,[10] gives so valuable a picture of the life of a law student and man of letters of that day, deserves to be counted among the distinguished members of this school. He began, he tells us, to consult records in order to get light on points of law; but soon came to value them as aids to historical

[1] "A Treatise of Gavelkind. Both the name and thing. Showing the true Etymologie and Derivation of the one, the nature, antiquity, and original of the other. With sundry emergent Observations, both pleasant and profitable to be known of Kentish men and others, especially such as are studious either of the ancient Custome or the Common Law of this Kingdome. By (a well wisher to both) William Somner;" for gavelkind generally see vol. iii 259-263.

[2] Robinson, Gavelkind Pref. to first Ed.; and see Elton's Ed. (1897) 222-229.

[3] "I may perchance (at first sight, at least) be thought too bold with the Common lawyers, too busie in their Commonwealth, too much meddling in matter of their peculiar science; yet no otherwise I hope that they and their friends may be willing to excuse me, . . . my intent being only to do them service, and their profession right, by holding forth to publicke view some Antiquities tending at once to the satisfaction of the one and illustration of the other;" and cp. his concluding remarks in which he says his intention was to "handle the subject chiefly in the historical part," and to discover its beginnings, and "not to thrust his sickle into the harvest of the common lawyer."

[4] Vol. iii 553 n. 6. [5] Dict. Nat. Biog. [6] Above 402.

[7] Above 19-20. [8] Dict. Nat. Biog.

[9] The Autobiography of Sir Simonds D'Ewes, edited by Halliwell.

[10] Thus, op. cit. i 256, while recognizing Selden's "deep knowledge and almost incomparable learning," he says that he was "a man exceedingly puffed up with the apprehension of his own abilities;" see ii 47-52 for his account of Sir Nicholas Hyde, with whom he had had a difference of opinion.



study.[1] He was free of Cotton's library and borrowed his books and pamphlets. He tells us how he transcribed the Mirror,[2] Fleta[3] and the Leges Henrici Primi,[4] and fills pages with the antiquarian researches which he made into the origins of his own and his wife's family. At one time he had planned to write a history of England from original sources; and he planned and partially executed an Anglo-Saxon dictionary.[5] But, as Jessopp rightly says, he had little constructive ability. He was a copyist and a collector rather than an author.[6] Though a Puritan and a convinced believer in constitutional government,[7] he was naturally timid; and, during the period of prerogative rule, was careful not to bring himself in conflict with the authorities—abandoning London and his beloved records rather than risk the consequences of disobeying a royal proclamation.[8] The book which has made his name famous is his Journals of the Elizabethan Parliaments, which is still of primary importance for the constitutional history of the Tudor period.

Lambard, Somner, Spelman, and D'Ewes were essentially students and scholars. Prynne was also a student and a scholar, and in addition a controversial gladiator.[9] Mutilated and imprisoned by the Star Chamber for his attacks on the king, queen and bishops in the days of Charles I.'s attempt to govern by the prerogative; a distinguished member of the Long Parliament, and a prime mover in the impeachment of Laud; an opponent alike of the claims of the Independents and Presbyterians to be supreme in the state; an opponent of the army and its dealings with the king, and imprisoned for three years without trial by the Commonwealth government; after Cromwell's death, at length successful in asserting his right to sit in Parliament; an active supporter of the Restoration of Charles II., and of all attempts to restrict the Act of Indemnity; reprimanded by the Speaker for his pamphlet in favour of toleration to the Protestant nonconformists; a recognized authority upon constitutional law and Parliamentary procedure; and, after the Restoration, keeper of the records in the Tower—he had a career which would have left ordinary men little time for serious literary work. And yet

[1] "I at first read records only to find out the matter of law contained in them; but afterwards perceiving other excellences might be observed from them, both historical and national, I always continued the study of them after I had left the Middle Temple and given over the study of the common law itself," op. cit. i 235.

[2] Ibid 258. [3] Ibid 294-295. [4] Ibid 272.

[5] Dict. Nat. Biog. [6] Ibid.

[7] See Autobiography ii 132 seqq. for his comments on ship money; 104-105 for his sympathy with Prynne.

[8] Ibid ii 78 80.

[9] For his career see Sir Charles Firth's article in Dict. Nat. Biog., and Documents relating to the Proceedings against William Prynne (C.S.).

he was always writing. We may adopt a phrase which Bagehot applied to Brougham, and say that, "for many years he rushed among the details of his age and wrote as he ran." It is reckoned that the number of his books and pamphlets exceed two hundred. Most of them are fugitive controversial pieces. But there are many serious books on all sorts of subjects, religious and political; and during his tenure of office as keeper of the records, he published valuable works, illustrated by records up to that time unprinted. Among them we may note his Register of Parliamentary writs, an Abridgment of the records in the Tower of London said to have been collected by Cotton,[1] and the Animadversions on Coke's Fourth Institute. But, before he became keeper of the records, and indeed throughout his life, he was a conscientious seeker after truth. He always honestly tried to base his historical work on the best evidence. This is clear from such works as the "Demurrer to the Jews' long-discontinued Remitters into England," and his "Plea for the House of Lords." Sir Charles Firth says,[2] "In point of style Prynne's historical works possess no merits . . . the arrangement . . . is equally careless. Yet, in spite of these deficiencies, the amount of historical material they contain, and the number of records printed for the first time in his pages, give his historical writings a lasting value." His views on legal education were sound and sensible—he entered a powerful protest against the decay, after the Restoration, of the old system;[3] and he was keenly alive to the deficiencies of the common law. We have seen that he urged upon the common lawyers the need to study the continental literature of commercial law, if they were to make the best use of the opportunity which their victory over the court of Admiralty had given to them;[4] and he had visions of making, and inducing Parliament to enact, a revised edition of the statute law.[5]

Aubrey gives us a quaint description of the manner in which this astonishing literary output was produced.[6] "His manner

[1] But the better opinion is that the collection was made by William and Robert Bowyer, see Dict. Nat. Biog. *Cotton* p. 313.

[2] Dict. Nat. Biog.; apparently his contemporaries formed a somewhat similar opinion; Pepys, Diary (Ed. Wheatley) v 352, relates how Francis Finch "told me Mr. Prin's character: that he is a man of mighty labour and reading and memory, but the worst judge of matters, or layer together of what he hath read in the world;"—"which," adds Pepys, "I do not believe him in."

[3] Vol. vi 487-488 [4] Above 147.

[5] Pepys, Diary (Ed. Wheatley) v 279 — he "did discourse with me a good while . . . about the laws of England, telling me the many faults in them; and among others, their obscurity through multitude of long statutes, which he is about to abstract out of all of a sort; and as he lives, and Parliaments come, get them put into laws, and the other statutes repealed, and then it will be a short work to know the law, which appears a very noble good thing."

[6] Letters from the Bodleian Library ii 508, cited Dict. Nat. Biog. 436.



of study was thus: he wore a long quilt cap, which came two or three inches at least over his eyes, which served him as an umbrella to defend his eyes from the light; about every three hours his man was to bring him a roll and a pot of ale to refocillate his wasted spirits; so he studied and drank and munched some bread; and this maintained him till night, and then he made a good supper." It would seem that even if he went out to dinner his mind was chiefly occupied with his literary work.[1] There were giants of industry in those days. "Prynne, munching his crust of bread as with burning zeal he deciphered decaying documents in the filth and stench of the White Tower, is an heroic figure."[2]

But of this school of historians and lawyers the chief ornament, by the consent both of contemporaries and of posterity, is John Selden[3]—in Milton's words, "the chief of learned men reputed in this land."[4] I shall, in the first place, sketch briefly the main facts of his life and enumerate the most important of his works. In the second place, I shall attempt to give some account of the man himself and of the characteristics of those of his works which bear upon the history of English law.

(i) Selden was born in 1584. He was educated at Hart Hall, Oxford, and the Inner Temple, and became a bencher of that Society in 1633. From the first his tastes were historical and literary rather than strictly legal. In 1610, while still a student, he published three historical tracts on English History. He was fined in 1624 for refusing to act as Reader; and he never attempted to gain a large practice in the courts. What practice he had was probably of the consultative and conveyancing sort. He appeared in court chiefly in cases of constitutional importance, in which great historical learning was needed. From the first he joined the constitutional party—"περὶ παντὸς τὴν ἐλευθερίαν" is the motto which he wrote in all his books. In 1621 he incurred the displeasure of the king by helping the Commons in connection with their famous protestation. In 1623 he entered Parliament as member for Lancaster. In 1626 he sat in Charles I.'s second Parliament, and took an active part in the impeachment of Buckingham. In 1627 he argued for

[1] Pepys met him at dinner, and sat next him—he "in discourse with me fell upon what records he hath of the lust and wicked lives of nuns heretofore in England, and he showed me out of his pocket one, etc.," Diary (Ed. Wheatley) ii 244.

[2] Maitland, Collected Papers iii 454; see vol. ii 600 for Prynne's description of the state of the records.

[3] Fry's article in Dict. Nat. Biog.; life prefixed to Wilkins' Ed. of his works; G. W. Johnson, Memoirs of Selden; two articles by Professor Hazeltine on Selden as a Legal Historian, H.L.R. xxiv 105, 205.

[4] Milton, Areopagitica.

Edmund Hampden, who had been committed to prison by the Council for a refusal to lend money to the king. He took an active part in the Parliament which passed the Petition of Right, and on its dissolution was one of the members committed to prison. He was liberated in 1631, and, after the publication of his Mare Clausum, enjoyed some royal favour. But neither persecution nor favour made any difference to his political views. He sat as member for Oxford University in the Long Parliament, and showed himself a moderate member of the constitutional party. He was opposed, for instance, to the attainder of Strafford; and, at one time, the king thought of making him lord chancellor. When the split came, he adhered to the Parliament, though he had condemned the Parliamentary ordinance as to the militia. As we might expect, he took no very leading part in public affairs during the civil war, and ceased to have anything to do with them after 1649. During all these years, and till his death in 1654, he devoted the main part of his time to his literary works. The liberality of the earl and countess of Kent made this possible. He was steward of their manors, and spent his vacations at their country residence. After the death of the earl he continued to be on intimate terms with the countess —some said he was married to her. At any rate he lived during the latter part of his life in her town house in White Friars, and she left him much property when she died in 1651. He survived her only three years.

The extent and variety of Selden's literary output astonished his own contemporaries and astonishes us. It comprises, besides his Mare Clausum,[1] works on English history political and constitutional, works on ecclesiastical history, works upon classical and oriental subjects, and works on legal history. His works on English History political and constitutional comprise the "Jani Facies Altera," and "England's Epinomis," both dealing with early British, Saxon, and Norse customs; the "Duello or Single Combat;" the great work on "Titles of Honour;" the edition of six books of Eadmer; the edition of and critical preface to the Decem Historiæ Anglicanæ Scriptores. His great work on ecclesiastical history is the "History of Tithes," which raised a storm, because the obvious inference from the book was that tithes were due, not by divine, but by merely human law. He was summoned before the court of High Commission and forced to make some sort of submission. He also wrote three short tracts on matters theological, which were the outcome of discussions which he had had with James I. on his History of Tithes. His classical and oriental works are his book on the Arundell Marbles,

[1] Above 10-11.



many large works on points of Hebrew law,[1] and an edition of part of the history of Eutychius. His works on legal history comprise the Dissertatio ad Fletam; the notes upon Fortescue's De Laudibus, and upon Hengham's Magna and Parva; a short tract on the Office of Lord Chancellor; a tract on the privileges of the Baronage, written by order of the House of Lords; a tract on legal Judicature in Parliament; and two tracts on the origins of the law as to Probate, and as to the Administration of and intestate succession to chattels.[2] Besides these, there are a few other miscellaneous works on literary topics;[3] and a book which is very important as throwing a light upon the man himself—his Table Talk as reported by Richard Milward.[4]

(ii) In the Table Talk we see a man with a clear critical intellect, who has a keen eye for the weaknesses of all parties and all creeds. He can gibe at royalist and Parliamentarian alike, for their arbitrary acts and their love of place and power.[5] He can mock both at Episcopalian and Presbyterian for the fuss they made over the distinctive points of their several creeds—the mere "trimmings" of religion.[6] He is a true Erastian—"whether is the church or the scripture judge of religion? In truth neither, but the state;"[7] and therefore a man of the world with a shrewd eye to practical consequences. "There was never a merry world since the fairies left dancing, and the parson left conjuring. The opinion of the latter kept the thieves in awe, and did as much good in a country as a justice of peace."[8] "T'will be a great discouragement to scholars, that bishops should be put down. For now the father can say to the son, and the tutor to the pupil,

[1] De Diis Syriis; De Successionibus in bona defunctorum ad leges Ebræorum; De Successione in Pontificatum Ebræorum; De Jure Naturali et Gentium juxta Disciplinam Ebræorum; De Anno civili et Calendario Veteris Ecclesiæ seu Reipublicæ Judaicæ; Uxor Ebraica seu de Nuptiis et Divortiis Veterum Ebræorum libri tres; De Synedriis Veterum Ebræorum.

[2] The original of the Ecclesiastical Jurisdiction of Testaments; Of the disposition or administration of intestate goods.

[3] The Notes to Drayton's Polyolbion; a treatise on the Jews in England; a carmen protrapticon to Ben Jonson's Volpone.

[4] I have used Reynolds' Ed. published by the Clarendon Press.

[5] "They that first set it [the state] on fire; by monopolies, forest business, imprisoning of the parliament men 3° *Caroli* etc. are now become regenerate. . . . Certainly they deserved most to be punished for being the first authors of our distractions," op. cit. 83; "The parliament party, if the law be for them, they call for law; if it be against them, they will go to a parliamentary way: if law be for them, then law again," ibid 128; "Some of the parliament were discontented that they wanted places at court which others had got; but when they had them once, then they were quiet. Just as at a christening, some that get no sugar plums when the rest have, mutter and grumble; presently the wench comes again with her basket of sugar plums, and then they catch and scramble, and when they have got them, you hear no more of them," ibid 153.

[6] "Religion is like the fashion; one man wears his doublet slashed, another laced, another plain; but every man has a doublet: so every man has his religion. We differ about the trimming," ibid 161.

[7] Ibid 162.

[8] Ibid 130.

Study hard, and you shall have *vocem et sedem in parliamento*; then it must be, Study hard, and you shall have an £100 a year if you please your parish."[1] He had a hatred of all sorts of mysticism—"they talk (but blasphemously enough) that the Holy Ghost is president of their General Councils; when the truth is, the odd man is still the Holy Ghost;"[2] but he was no believer in morality without religion.[3] He had an equal hatred of all kinds of arbitrary power, and was keenly conscious of the absurdity of the then existing restrictions on the freedom of the press.[4] He had a true appreciation of the truth that genius is largely the capacity for taking infinite pains,[5] a true sense of the importance of first hand evidence.[6] In the troubled times in which his later years were passed he was fully conscious of the uselessness of the interference of a mere seeker after truth—"In troubled water you can scarce see your face . . . so in troubled times you can see little truth;"[7] "the wisest way for man in these times is to say nothing."[8] He was equally conscious of the consolations of literature—"Patience is the chiefest fruit of study. A man . . . by much reading, gains this chiefest good, that in all fortunes he hath something to entertain and comfort himself withal."[9] Such a man was likely to be a pleasant companion to those whose tastes were similar. By nature he was hospitable and social; and he could talk well and clearly on all subjects.[10] His active life in Parliament and the courts saved him from pedantry; and so, though, "he was of so stupendous learning in all kinds . . . that a man would have thought he had been entirely conversant amongst books . . .; yet his humanity courtesy and affability was such that he would have been thought to have been bred in the best courts, but that his good nature, charity and delight

[1] Op. cit. 288. [2] Ibid 53.

[2] "Morality must not be without religion, for if so, it may change, as I see convenience. Religion must govern it," ibid 119; Baxter, Additional Notes on the Life and Death of Sir M. Hale, says, at p. 40, that Hale had told him that Selden was no Hobbist, but a resolved and serious Christian.

[4] "Popish books teach and inform; what we know, we know much out of them. The fathers, church story, school-men, all may pass for popish books; and if you take them away, what learning will you have? Besides who must be judge? The customer or the waiter? If he disallows a book, it must not be brought into the kingdom; then lord have mercy upon all scholars!" Table Talk 29, 30.

[5] "The difference of men is very great . . . and yet it consists more in the affection than in the intellect . . . the one endeavours and strains and labours and studies; the other sits still and is idle, and takes no pains, and therefore he appears so much the inferior," ibid 111.

[6] "To quote a modern Dutchman when I may use a classic author is as if I were to justify my reputation, and I neglect all persons of note and quality that know me, and bring the testimonial of the scullion in the kitchen," ibid 31.

[7] Ibid 187. [8] Ibid 130. [9] Ibid 130.

[10] "His style in all his writings seems harsh and sometimes obscure . . . but in his conversation he was the most clear discourser, and had the best faculty of making hard things easy, and presenting them to the understanding, of any man that hath been known," Clarendon's Life (ed. 1843) 923.



in doing good, and in communicating all he knew, exceeded that breeding."[1]

A man of this character was eminently fitted to be a legal historian. It is true that the bulk of his work on English legal history is small as compared with the bulk of his work on oriental, ecclesiastical, and general historical subjects. But we must measure their importance by their quality not by their quantity. For the first time a first-rate scholar and historian, who was also a first-rate lawyer, applied his talents to the criticism and elucidation of the sources of English law. None of the other eminent scholars and historians of that day possessed quite the same combination of qualities and range of interests that he possessed. None, except Prynne, had anything like his enormous industry. And these talents and this industry were applied in accordance with the most modern canons of historical scholarship. None but the best evidence was sufficient.[2] The documents were made to tell their own tale in their own way, with as little intrusion as possible of the author's own point of view.[3] Though he dealt with very early periods of history, there was nothing of the antiquarian about his work. Ancient history he truly held was useful only in so far as it "gives necessary light to the present in matter of state, law, history, and the understanding of good authors."[4] No doubt his experience as a lawyer and a member of Parliament helped him to avoid "the sterile part of antiquity."[5] It gave him the power, not only to discern in the remote past what were the ideas and institutions which influenced the age in which he lived, but also to give a convincing account of their original contents and form, and of the manner of their development. He was able to do this effectually because, besides being a profound common lawyer, he had also a profound knowledge of other systems of law.[6] Ben Jonson truly wrote of him:—

> You that have been
> Ever at home, yet have all countries seen,
> And, like a compass keeping one foot still
> Upon your centre, do your circle fill
> Of general knowledge; watched men, manners too,
> Heard what times past have said, seen what ours do.[7]

He could therefore fully grasp the idea of legal history;[8] for he

[1] Clarendon, loc. cit.

[2] Above 410 n. 4; Hazeltine, H.L.R. xxiv 115-118.

[3] Ibid 110, 209, 210.

[4] Dedication of the History of Tithes, cited Hazeltine, H.L.R. xxiv 112.

[5] Preface to the History of Tithes.

[6] Cp. Hazeltine, H.L.R. xxiv 207, 214, 215.

[7] Underwoods, Works (ed. 1756) vi 365.

[8] "History involves comparison, and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history," Maitland, Collected Works i 488.

could fully appreciate the spirit of those English rules and institutions which were similar to those of other countries, and at the same time, give due weight to those peculiarities, which, because they were peculiarities, were vitally important for the understanding of large differences in the ultimate development of our national law and our national life.

Selden's literary style is often harsh and cumbrous, and his method of arrangement faulty. He was so learned that his learning suggested digressions, which are apt to confuse the reader ;[1] and for this reason he has never been a popular writer. This defect appears chiefly in his larger works. He appears at his best in some of the shorter works which he wrote upon English legal history. But this defect has had no appreciable effect upon real students, either of his own day or in the succeeding ages. He and his contemporaries founded, as Professor Hazeltine has said, "a school of English legal history, and upon their labours all subsequent centuries have built. Clear discernment of the value of legal historical studies and effective work in the sources themselves, so characteristic of the antiquaries of three hundred years ago, formed a scholarly tradition that has lasted from that day to this."[2] In the last century, it is true, law and history had tended to fall somewhat apart, to the mutual disadvantage of both. It is one of Maitland's chief titles to fame that he renewed that alliance between the history of English law and the general history of England and of other countries, which the lawyers and historians of this period had formed. Maitland, by precept and example, showed again what they had proved before, that history can humanize law and that law can correct history—that together they can accomplish much that neither can accomplish alone. We may hope and expect that this alliance, thus renewed, will never again be dissolved. At least we can say that so long as the Society, rightly called by Selden's name, exists, there is a sufficient surety that the mutual obligations of the compact will be carried out.

But it is time to turn again to the sixteenth and seventeenth centuries, and examine briefly the effects of all this professional and literary activity upon the development of the common law.

### *The Condition of the Common Law*

As a settled system the common law was much older than any of the supplementary and rival bodies of law which had sprung up during this period. This gave it certain advantages and exposed it to certain disadvantages as compared with its rivals.

[1] Hazeltine, H. L. R. xxiv 215, 216; above 402-403.
[2] H.L.R. xxiv 219.



The advantages which it possessed were mainly three in number. Firstly, it was a very much fuller body of law. This is shown by the vastly greater bulk of its literature as compared with the literature of the civil law, the law merchant, the law administered by the court of Star Chamber, and the law administered by the court of Chancery. Secondly, it possessed a system of legal education and professional training which was as excellent as it was unique. We have seen that, in consequence, the men thus educated and trained were the best fitted to act as practitioners and judges in many of the rival courts and councils of this period; and that their influence helped to introduce and to maintain in those tribunals the ideas and principles of the common law.[1] Thirdly, the result of this training was to establish a high standard of professional honour, which made the common law courts relatively pure tribunals. There were far fewer scandals connected with them than with the newer courts, which were more closely connected with the Court and the corrupt influences of the Court.

But the common law naturally suffered from the defects of some of these qualities. Firstly, it was incumbered with large masses of learning which were rapidly becoming obsolete. The management and elucidation of the technical details of the real actions still occupied a large space in the reports; and the incidents and consequences of tenure gave rise to much litigation. Such matters as appeals of felony, compurgation, and even trial by battle, occasionally emerge. Secondly, as a result of the strictly professional training of its members, it continued to be a very technical system. The maintenance of its technical rules, and the adherence to strict standards of logical reasoning, were objects which were still pursued at the expense of considerations of justice and convenience. We can see this phenomenon in all branches of the common law; and naturally it is most in evidence in the older branches of that law. Thus the rules of process and pleading, in spite of the reforms made by the statutes of Jeofail,[2] continued to be productive of much injustice; and to make the result of a law suit dependent, more upon the skill and accuracy of the attorney, pleader, and other officers of the law, than upon the merits of the case. For instance, in 1619, there was a case as to a right to tithes in which, after four arguments at the bar, the plaintiff got judgment; but, three years later, this judgment was reversed on account of a purely technical error in the entry of the judgment.[3] Similarly, in 1621, an executor lost his action because,

[1] Vol. iv 270-272.
[2] Ibid 535-536.
[3] Cro. Jac. 518 n. (*b*)—"After this case had been argued four times at the bar, judgment was given in the King's Bench on this special verdict in favour of the

by mistake, the Christian name of the testator was inserted in the declaration instead of the Christian name of the plaintiff.[1] The rules of criminal procedure, which were not helped by the statutes of Jeofail,[2] were even more strict.[3] The technical rules of the mediæval land law upon such topics as disseisin, discontinuances, releases,[4] and fines [5] still gave rise to much abstruse argument at the bar and on the bench; and the rigid technicality with which the land law was administered gave rise in this period to many fixed rules of construction, which, even at the present day, may occasionally prevent the wishes of the parties from having their intended effect.[6] Thirdly, the length of time taken to decide cases, in which any important question of law was in issue, was sometimes enormous. In Plowden's reports we read of one case which was pending for three,[7] and another which was pending for nine years;[8] and in Coke's reports, of one case that was argued more than seven,[9] and another that was argued twenty-one times.[10]

These were undoubted defects which were, to a large extent, due to the same causes which gave to the common law many advantages over its rivals. But the common law was not wholly untouched by the spirit of the Renaissance. We have seen that the activity of the legislature introduced many new topics into the common law.[11] At the same time their jealousy of the rival courts, which were encroaching upon its sphere, made the common lawyers ready to modify, explain, and restate old branches of law, and to develop new branches of law, in such a way that they could be made to serve the needs of the new age. We have seen that the history of the law merchant,[12] and of the literature of the common law,[13] show that the efforts of the common lawyers in these directions were not wholly unsuccessful. We shall see in the Second Part of this Book what were the results of these efforts upon particular branches of the law. Here I can

plaintiff; but in Michaelmas term 19 Jac. 1 a writ of error was brought in the Exchequer Chamber, and the judgment reversed, not for the matter of law, but because the judgment was entered that the defendant should be *in misericordia* for the lamb, for the conversion of which the jury had found him not guilty."

[1] John Thomas v. Willoughby (1621) Cro. Jac. 587.
[2] See the King v. Sherington Talbot (1634) Cro. Car. at p. 312.
[3] See e.g. the King v. Sorel (1614) Cro. Jac. 324; Sir Henry Ferrer's Case (1635) Cro. Car. 371.
[4] Vol. ii 588.
[5] Vol. iii. 236-245.
[6] Wild's Case (1599) 6 Co. Rep. 16b; cp. Dyer 354a; Pells v. Brown (1621) Cro. Jac. 590; Browne v. Jerves (1612) Cro. Jac. 290.
[7] Ratcliff's Case (1564) Plowden at p. 268.
[8] Sir Henry Nevill's Case (1570) Plowden at p. 381.
[9] Mary Portington's Case (1614) 10 Co. Rep. at p. 37a.
[10] Butler and Baker's Case (1597) 3 Co. Rep. at p. 35b.
[11] Vol. iv c. ii
[12] Above 140-148.
[13] Above 378-412.



only summarize shortly the chief directions in which, during this period, the modern common law was being developed.

In all the leading reports of this period we get, in the arguments of counsel and in the reasons given by the judges, summaries and restatements of many branches of the mediæval common law. We shall see that Coke's reports are especially remarkable for this feature.[1] But it is present in many of the other sets of reports. Thus (to take one or two out of many illustrations) in Dyer's reports we get discussions of the sphere of the actions of debt and account,[2] and of the rules as to the demurrer of the parol when an infant is the plaintiff.[3] In Plowden's reports we get a good historical account of the statute De Donis and the writs of formedon,[4] as to the rules relating to forfeiture for felony,[5] as to the levying of fines,[6] as to the law of inheritance.[7] In Croke's reports we get discussions as to the effect of letters of naturalization or denization on the capacity to inherit English land,[8] as to the position of a mortgagor in possession,[9] as to discontinuance and disseisin.[10]

Similarly we can see in the reports the manner in which the doctrines of the mediæval common law were being developed in many different directions. Let us glance cursorily at one or two of these developments.

We have seen that the law as to tenures of and estates in the land had reached practically its final form when Littleton wrote.[11] The only existing estate which does not appear in Littleton is the estate from year to year; and it seems to have been recognized in 1520[12]—no doubt because to construe a tenancy as a tenancy from year to year was fairer both to landlord and tenant, than to construe it as a tenancy at will with the right to emblements.[13] But, though the settlement of the law as to tenures and estates had fixed the root principles of this branch of the law, both its bulk and complexity were, during this period, rapidly increased by the manner in which landowners were using

[1] Below 464-465.
[2] Core's Case (1535) Dyer 20a.
[3] Basset's Case (1557) Dyer 136a.
[4] Willion v. Berkeley (1561) Plowden at p. 235.
[5] Hales v. Petit (1561) Plowden 253.
[6] Stowel v. Lord Zouch (1563) Plowden 355.
[7] Clere v. Brook (1573) Plowden 442.
[8] Godfrey v. Dixon (1620) Cro. Jac. 539.
[9] Powsely v. Blackman (1623) Cro. Jac. 659.
[10] Stone v. Newman (1636) Cro. Car. 427.
[11] Vol. ii 576-582.
[12] Y.B. 13 Hy. VIII. Trin. pl. 1 *per* Willoughby.
[13] See Smith's Leading Cases (ed. 1896) ii 126-127, note to Clayton v. Blakey; as is there pointed out—"It was better for the lessor himself . . . since a late tenant at will entitled to emblements would have had the whole profits of the land, from the determination of the will till the harvesting of the crops, without paying any rent for it, whereas the tenant from year to year pays rent until the day on which he quits the premises."

the new powers over their land which the statutes of Uses and Wills had given to them. New doctrines were being added to the land law, new forms of conveyancing were arising, and fixed rules of construction were being laid down for the interpretation of these new instruments. The efforts of the courts to prevent these new powers of landowners from being so used as to fetter freedom of disposition, were creating the beginnings of the modern rules against remoteness of limitation.[1] The protection given to copyholders had, as we have seen,[2] brought the legal incidents of these tenants under the survey of the common law, and was giving rise to a number of rules as to the reasonableness of copyhold customs, and as to their interpretation.[3]

The department of criminal law was scantily represented in the Year Books. But in many of the reports and books of the period upon the pleas of the crown,[4] or the justices of the peace,[5] there are discussions on many points of criminal law and procedure. Thus in Plowden's reports there is, "A report of certain points which were ruled and holden at the Sessions held at the town of Salop on Monday the Ninth day of July in the First Year of the Reign of our Sovereign Lady Queen Mary";[6] and in many other reports more attention is paid to points of criminal law than in the preceding period. We shall see that, by the end of this period, the growth of the modern law of constructive treason[7] had very fully supplemented both the defects of Edward III.'s statute,[8] and the extensions of that statute made from time to time by the legislature.[9]

The department of tort was being rapidly developed by the growing use of actions on the case. Thus we can see the beginnings of the idea that in certain sorts of cases liability should be based, not merely upon an act forbidden by law which has damaged the plaintiff,[10] but upon an act done negligently by the defendant.[11] Similarly we can see that the nature of liability founded upon deceit was emerging. One or two cases show us that the courts were beginning to think about abandoning the

[1] Vol. vii 197-214. [2] Vol. iii 208-213.

[3] See e.g. Parton v. Mason (1561) Dyer 199b; Underhill v. Kersey (1610) Cro. Jac. 226; Lutterel v. Weston (1613) Cro. Jac. 308; Rowden v. Marsden (1627) Cro. Car. 42.

[4] Above 392-393. [5] Vol. iv 115-119.

[6] Plowden 97-101. [7] Vol. viii 307-321.

[8] Vol. iii 287-293. [9] Vol. iv 496-498.

[10] Vol. iii 375-377.

[11] Southcote's Case (1601) 4 Co. Rep. 83*b*—at p. 84*a* Coke is clear that an ordinary factor or servant is only liable for negligence; the Countess of Shrewsbury's Case (1601) 5 Co. Rep. at p. 14*a*—liability for negligence when goods are trusted to another is discussed; cp. Bayly v. Merrel (1616) Cro. Jac. 387, where it was ruled that the plaintiff's gross negligence in not ascertaining the true facts was an answer to an action for deceit.



view that it was impossible to base civil liability upon intention to deceive, because it was impossible to try the thought of a man.[1] As yet, however, there was no change in the principle upon which a master was made liable for the torts of his servant. The test of liability was still the command of the master to do the tort complained of.[2] Particular torts also were beginning to emerge with some distinctness. Thus the conditions under which actions for slander, malicious prosecution, or conspiracy lay, were being gradually elucidated, and were giving rise to rules of substantive law as to the nature of these torts.[3] Similarly the working of the actions of Detinue, Trover, and Trespass was giving rise to more definite rules of law as to the rights of the owners or possessors of chattels.[4] The mediæval rules, also, as to the modes in which chattels could be transferred were restated in some of the cases of this period.[5] It is clear from these and other cases that a law of personal property was being gradually disengaged from the law of tort; and this development was assisted by two related causes—(i) the growth of the law of contract, and (ii) the growth of the commercial jurisdiction of the common law courts.

(i) The law had fully grasped the idea that a contract is in essence an agreement.[6] Further, it was beginning to have some very clear views as to the nature of that test of consideration which distinguished an enforceable contract from a mere unenforceable agreement.[7] It was beginning to distinguish between legal and illegal,[8] between past and executed considerations,[9] and between substantial considerations, and considerations which

[1] We get the old idea in a statement of Whiddon *arg.*, Plowden 46—"Covin is a secret thing contained in the heart of a man which by intendment another person can have no knowledge of"; cp. vol. iv 481-482; in Chandelor v. Lopus (1603) Cro. Jac. 4 the argument of the plaintiff in error admits that, if an affirmation were made with knowledge of its falsity, deceit would lie; this ground of action was further discussed in Southern v. How (1618) Cro. Jac. 468-471; in Furnis v. Leicester (1619) Cro. Jac. 474, it is laid down that "the sale of goods which were not his own, but affirming them to be his goods, knowing them to be a stranger's, is the offence and cause of the action"; see vol. viii 68-69, 426.

[2] The Lady Russell's Case (1603) Cro. Jac. at p. 19; vol. iii 382-385.

[3] Vol. viii 346-378, 385-391, 392-397. [4] Vol. vii 448-464.

[5] Vol. iii 353-359; in Hawes v. Leader (1611) Cro. Jac. 270 there is a grant of goods by deed, and a "gift of possession of them by a pewter dish"; in Rose v. Bartlett (1632) Cro. Car. 292 there is a grant by deed, and a "gift of a horse in the name of seisin of the goods."

[6] "In contracts it is not material which of the parties speak the words, if the other agrees to them, for the agreement of the minds of the parties is the only thing the law respects in contracts," Browning v. Beston, Plowden at p. 140 *per* Catline Serjeant *arg.*

[7] Vol. viii 8-25.

[8] Bridge v. Cage (1606) Cro. Jac. 103; Mackallen v. Todderick (1634) Cro. Car. 337.

[9] Hunt v. Bate (1568) Dyer 272*a*; Sidenham and Worlington's case (1585) 2 Leo 224: Lampleigh v. Brathwait (1616) Hob. 105.

were so vague as to be illusory.[1] Similarly it was beginning to have some clear ideas as to the conditions under which an executory contract could be revoked.[2] A decision of 1629 shows that an action on the case was being applied to recover money paid under a mistake of fact.[3] Later it was held that assumpsit lay in such a case—a new application of the action which will, in the future, help to give rise to the modern law of quasi contract.[4]

(ii) The growing jurisdiction of the common law over commercial cases was felt in two directions. Firstly, it was giving rise to a certain amount of law as to particular contracts. Thus cases as to sales,[5] hire,[6] agency,[7] and partnership[8] came before the courts during this period; and in a case of 1620 we get the beginnings of the modern law as to contracts in restraint of trade.[9] Secondly, it was familiarizing the common law with the notion of a chose in action. The common law still maintained that choses in action were, as a rule, unassignable;[10] but we shall see that the introduction of negotiable instruments into the law was beginning to make a large exception to that rule.[11]

In the law of persons the proprietary, contractual, and delictual capacity of infants and married women was being elucidated. We have seen that the main principles of this branch of the law had been established in the mediæval period.[12] The reported cases of this period rendered these principles more precise in their application. In particular it was made quite clear that an infant's contracts were as a general rule voidable,[13] but that his contract for necessaries was valid;[14] and the fact that the goods were necessaries must be alleged and proved by the plaintiff.[15] Similarly the mediæval principles as to the position at common law of executors and administrators were further developed.[16] As we have seen, their liability to be sued by the

[1] Tolson v. Clark (1636) Cro. Car. 438, overruling Cooks v. Douze (1632) ibid 241.

[2] Hurford v. Pile (1619) Cro. Jac. 483; Treswaller v. Keyne (1622) Cro. Jac. 620.

[3] Cavendish v. Middleton, Cro. Car. 141.

[4] Vol. viii 94.

[5] Ibid § 2.

[6] Lee v. Atkinson and Brooks (1610) Cro. Jac. 236.

[7] Vol. viii 222-228.

[8] Hackwell and wife v. Eastman (1617) Cro. Jac. 410.

[9] Broad v. Jollyfe (1621) Cro. Jac. 596.

[10] The king v. Twine and others (1608) Cro. Jac. 179, 180.

[11] Vol. vii 542; vol. viii 163-164.

[12] Vol. iii 510-533.

[13] Ketsey's Case (1614) Cro. Jac. 320.

[14] Whittingham v. Hill (1619) Cro. Jac. 494—"An infant shall not be bound by his bargain for anything but for his necessity, viz. diet and apparel, or necessary learning; but his buying to maintain his trade, although he gain thereby his living, shall not bind him, nor his covenant to bind himself apprentice, unless it be by special custom"; cp. Gylbert v. Fletcher (1630) Cro. Car. 179.

[15] Ive v. Chester (1620) Cro. Jac. 560.

[16] Vol. iii 572-591.



action of assumpsit was finally ascertained during this period;[1] and, after some doubts, it was settled that they could be sued by this action upon a promise to do an act as well as upon a debt.[2] These decisions practically settled the sphere within which the maxim *actio personalis moritur cum persona*[3] is applicable in our modern common law.

We have already seen that the leading principles of the law of pleading were settled in the mediæval period;[4] but that the rules themselves were not so detailed or perhaps so rigid as they afterwards became.[5] We shall see that the growth in the detail and rigidity of these rules was due largely to the rise of written pleadings.[6] A very large number of cases decided in this period turned upon the form and the effect of these written pleadings; and in this way the detailed modern rules of pleading were constructed upon the principles of the mediæval period. No doubt these rules often assisted to defeat the claims of substantial justice.[7] But they compelled lawyers to attain a very high standard both of verbal and of logical accuracy. And, in an age when legal doctrine was being rapidly developed, this was a gain of immense value; for, by ensuring that that development took place upon the lines marked out by the principles underlying the forms of actions, it preserved the continuity of the development of common law doctrine.

We shall see that these developments in the law of pleading were partly the cause and partly the effect of an important change in the law of evidence.[8] By the end of this period the facts in issue were generally proved by witnesses. With their appearance we get the beginnings of the modern law of parol evidence. The judges were beginning to recognize that there were some things of which they would take judicial notice; and that this judicial knowledge was something different from the private knowledge of the judge.[9] They were beginning to recognize the need for expert evidence on some points,[10] to discountenance hearsay

[1] Vol. iii 451-452.

[2] Berisford v. Woodroff (1617) Cro. Jac. 404; in Sanders v. Esterly (1617) ibid 417 it was so decided, but it is said that Tanfield C.B. doubted, and that there were precedents the other way; Fawcet v. Charter (1624) Cro. Jac. 662—it was finally decided by the Exchequer Chamber, Tanfield C.B. dissenting.

[3] Vol. iii 576, 582, 584.

[4] Ibid 633-634.

[5] Ibid 634-639, 655.

[6] Vol. ix 308-315.

[7] Above 413; vol. ix 308.

[8] Vol. iii 654; vol. ix 181-183.

[9] "You judges have a private knowledge and a judicial knowledge and of your private knowledge you cannot judge. . . . But when you have a judicial knowledge there you may, and you may give judgment according to it," Partridge v. Strange and Croker (1553) Plowden at p. 83 *per* Saunders *arg.*

[10] "I grant that if matters arise in our law which concern other sciences or faculties we commonly apply for the aid of that science or faculty which it concerns. . . . And therefore in 7 H. 6 in a case that came before the judges, which was determinable in our law and also touched upon the civil law, they were well content

evidence,[1] and to excuse a witness from answering questions which might incriminate him.[2] They were coming to have some very precise rules as to the evidence necessary to support a writ of attaint. The attaint jury might only consider the evidence which was before the original jury, but the original jury might produce new evidence in support of their verdict.[3]

Throughout this period the common law courts maintained a control over the local authorities concurrent with that exercised by the Council and Star Chamber. The prerogative writs, it was solemnly ruled in 1620, ran to all parts of the king's dominions, whether or no they were subject to a franchise jurisdiction.[4] By means of these writs, by writs of error, by actions for trespass, or by informations, the doings of the justices of the peace,[5] of the borough Courts,[6] of courts leet,[7] and of parishes [8] were frequently controlled; and rules were laid down for the guidance of these authorities on points of law and procedure. Similarly the validity of by-laws of cities,[9] and even of manors [10] could be questioned by the like methods.

From this summary it is evident that the common law was full of vigorous life. But, though its existence was never in serious danger during this period, its supremacy was in some danger; and that danger did not pass till the period of the Long Parliament.[1] The reasons for holding this view I have already in part explained.[2] But here I would draw attention to another set of reasons, arising, partly from the mental outlook of the common lawyers, partly from the relations of the common law courts to the crown, and partly from the dominant tendencies of European political thought in the latter part of the sixteenth and earlier part of the seventeenth centuries.



The principles of the common law were still very mediæval in their substance. The mediæval authorities, which were always appealed to upon all questions of public law,[3] constantly reminded the common lawyers of the mediæval ideas as to the supremacy of law in the state. But we have seen that, all over Europe, political thought was tending to substitute for the supremacy of law the sovereignty of some person or body of persons.[4] England was not unaffected by these ideas even in the Tudor period.[5] But in the Tudor period the latent antagonism between the mediæval and the modern theories was never allowed to develop. The Tudors never, if they could help it, allowed cases in the common law courts to raise political questions or to rouse political passions.[6] Thus questions as to the political theory sanctioned by the common law, were left in that state of semi-obscurity in which so many political questions were left by the Tudors. But we shall see that the first Stuart very definitely held the political theory which had become dominant on the Continent; and that he used the whole weight of the strong executive created by the Tudors to maintain it.[7] Now it is obvious that no warrant could be found for such a political theory in the common law. It was therefore difficult for any learned common lawyer to see eye to eye with a king who maintained it. On the other hand, we have seen that the king had many ways of influencing the judges of the common law courts.[8] There was therefore every inducement to the common lawyers to go with him as far as possible along the road which he desired them to take. The result was that the political theories at the back of the minds of the judges set to decide points of public law were vague and confused, because they themselves halted between two very different sets of opinions. Some of them honestly thought that it was both desirable and possible to deduce from their obscure mediæval authorities a body of law which would more or less conform to the new political theories. To others it appeared neither desirable nor possible. Thus from the common

to hear Huls who was a batchelor of both laws, argue. . . . And in an appeal of mayhem the judges of our law have used to be informed by surgeons whether it be a mayhem or not," Buckley v. Rice Thomas (1554) Plowden at pp. 124-125 *per* Saunders J.

[1] In Browning v. Beston (1554) Plowden at p. 143, Bromley C.J. said, with reference to a point of pleading—"It is not a precise allegation . . . that the said Browning did covenant or grant that if the rent was in arrear the lease should be void, but it is an affirmation that the indenture says so. . . . Such allegation is but the report of the saying of another, viz. that the indenture says so. And it might justly be said to him, 'You say that the indenture says so, but what say you?'"

[2] Dighton and Holt's Case (1616) Cro. Jac. 388.

[3] Rolfe v. Hampden (1541) Dyer 53b.

[4] Richard Bourn's Case (1620) Cro. Jac. 543; for the prerogative writs see vol. i 226-231; Jenks, Yale Law Journal xxxii 523.

[5] The Queen v. Grasseley (1562) Dyer 210b—information in the Star Chamber; Bumpsted's Case (1636) Cro. Car. 448—writ of error; William Slater's Case (1638) Cro. Car. 470—certiorari; Crawley's Case (1640) Cro. Car. 567—habeas corpus; sometimes the judges were consulted on a point of law or practice, see Anon. (1561) Dyer 187a—a question as to the jurisdiction of the justices under 8 Henry VI. c. 9 (forcible entry) asked by the Lord Keeper.

[6] Middleton's Case (1574) Dyer 332b—mandamus to restore a citizen of London who has been disfranchised by the City.

[7] Anon. (1562) Dyer 211b—the steward may fine a leet jury who refuses to present.

[8] Nichols v. Walker and Carter (1631) Cro. Car. 394—action of trespass to question the legality of a rate made by a parish; cp. Jeffrey's Case (1590) 5 Co. Rep. 66b.

[9] The Chamberlain of London's Case (1590) 5 Co. Rep. 62b—validity of a by-law of the city of London; Clark's Case (1596) 5 Co. Rep. 64a.

[10] James v. Tutney (1639) Cro. Car. 497—a by-law as to use of commons.

[1] Vol. iv 293.
[2] Ibid 283-285.
[3] Vol. vi 31-54.
[4] Vol. iv 192.
[5] Ibid 200.
[6] Ibid 190, 208-209; vol. vi 4-6.
[7] Ibid.
[8] Above 351, 352.

law courts it was not possible to get decisions that were wholly satisfactory to either of the contending parties which divided the state.[1]

On the other hand, the newer courts and councils, which depended upon the prerogative, could carry out in a whole-hearted way the consequences of the new political theories. It was inevitable therefore that the king should wish, when possible, to bring cases of political interest before them. It was not of course possible to do so in many of the great leading cases of the earlier part of the seventeenth century; and we have seen that the expedient was resorted to of filling the bench with judges whose political views could be depended upon.[2] The result was that the uncertainty of the political theories sanctioned by common law became more marked than ever. Cases were decided which seemed to give the king powers which would make it possible for him to realize his views as to the sovereignty of the king in the state.[3] And, if the law laid down in these cases had been accepted, it cannot be doubted that the common law would have lost its position of supremacy in the state, and have become at most primus inter pares. It is clear, for instance, that a good deal of the public law of the state, both civil and criminal, would have been administered by the Council, Star Chamber, and subordinate branches of the Council;[4] and it is very doubtful if the common law courts would have gained their exclusive control over commercial law.[5]

The common law, then, at the beginning of the seventeenth century, suffered from the serious defect of being politically weak in an age of keen political controversy. This was due, as we have seen, to the fact that the common lawyers as a whole had no very clear or consistent view as to the bearings upon the political controversies of the day, of the legal principles contained in the common law. This defect might have had very serious consequences, since, if it had not been removed, it might have made the common law unsatisfactory both to the king and to the parliamentary opposition. But, fortunately for the common law, it was removed, mainly by the literary work and the political career of Edward Coke. His literary work gave a form to its doctrines which was at once positive, intelligible, and modern. His political career gave it a political theory, by identifying its doctrines upon matters of public law with the views of the parliamentary opposition. Thus to him it is chiefly due that the

[1] Below 435-436; vol. vi 30. [2] Above 351.

[3] Thus in Lord Say's Case (1639) Cro. Car. 524 the court refused, after the decision in the case of Ship money, to listen to an argument against the legality of the tax.

[4] Vol. iv 77-80, 83-87, 105-106. [5] Vol. i 552-554, 555-556; above 152-153.



victory of the Parliament meant the victory of a modernized common law, competent to guide the activities of a modern state. Clearly a man whose work has had so large an effect upon the whole future course of our legal history demands and deserves a far more detailed treatment than any of his contemporaries.

## II

### Edward Coke, and the Relation of the Common Law to its Rivals

We have seen that during the Tudor period the work of making England a territorial state of the modern type had been accomplished, partly by the legislature, partly by newly created or newly organized courts and councils, and partly by the common law courts. During the greater part of this period these courts and councils had worked harmoniously together. But, with the natural expansion of their respective jurisdictions, conflicts between them had become more frequent. The common law courts were in the habit of attacking rival courts which, in their opinion, had exceeded their jurisdiction. On the other hand, those who sued at common law found themselves imprisoned, and compelled to abandon their suits or even the fruits of judgments obtained; while those who executed the process of the common law were "so terrified that they dare not execute laws or writs."[1] In the paper drawn up by Anderson C.J., in 1591, stating the law as to commitments by the Council and complaining of these attacks upon the common law,[2] it is noted that, after it had been presented, "more quietness followed in the causes mentioned than before."[3]

But these conflicts became more bitter when the restraining influence of Elizabeth was removed; and, in the early years of the seventeenth century, it soon appeared that the question of the relation to one another of these various courts administering various kinds of law within the English state, urgently demanded a settlement. We shall see that this question came to be merged in that larger question as to the whereabouts of the sovereign power in the state, which underlay the various causes of conflict between the king and his Parliament. The newly created or newly organized courts and councils naturally magnified the

[1] S.P. Dom. 1595-1597 335, cclxi 69.

[2] Vol. i 509; App. I.; vol. vi 32-34.

[3] "Noted that all the judges and barons subscribed this and delivered copies to the Lord Chancellor and Treasurer, 34 Eliza., after which more quietness followed in the causes mentioned than before," S.P. Dom. 1595-1597 335, cclxi 69; 1 And. 298, printed in App. I. (2).

royal prerogative on which they leaned and to which they owed their authority. They therefore gravitated to the royalist view that in the last resort the prerogative was the sovereign power in the state.[1] On the other hand, the common law favoured the mediæval idea that in the state the law was supreme, and that the prerogative was therefore limited by it. The common lawyers therefore gravitated to the parliamentary view that the prerogative was subject to definite legal limitations, and that ministers who disregarded those limitations were criminally or civilly responsible to the law; while the parliamentary leaders naturally held that the law to which they were responsible must be that common law, in which alone they could find legal justification for their political views.[2] But the additions made by the modern cases and statutes to the mediæval principles on which the common law was founded, made it often obscure and sometimes irrational. Was it capable, it might fairly be asked, of supplying the principles needed to guide the development of the public and private law of a modern state? The common lawyers maintained that their common law was all-sufficient for this purpose. Though the growth of an independent system of equity, the slow development of a reasonable system of commercial and maritime law, and the scantiness (even at the present day) of some departments of our family law, show that, to some extent, they exaggerated the capacity of their system; the history of English public law in the seventeenth century, and the growth of new branches of private law in the eighteenth and nineteenth centuries, have justified their faith. That the common law was given the chance of justifying the faith of those who believed in its capacity is largely due to the judicial, political, and literary career of Edward Coke.

Coke's career as a judge, and as a leader of the parliamentary opposition, was one of the most important factors in securing the supremacy of the common law, not only over the many rival bodies of law which had sprung up in the sixteenth century, but also over all bodies and persons in the state, save only the High Court of Parliament. His writings form the starting-point of the modern as distinct from the mediæval common law, because in them mediæval rules are so harmonized with the modern additions, that they fitted the common law to guide the future legal development, not only of England, but also of the many dominions which Englishmen were to found beyond the seas. Therefore if we would understand the place which the common law holds in our modern English state, and the modern history of its doctrines, we must know something of the man whose character, career, and writings have had so large an influence upon the ascertainment of its constitutional position, and upon the development of its principles.

[1] Thus Bacon told the king in 1615 (Spedding, Letters and Life v 236) that the writ *de non procedendo rage inconsulto*, below 439, is a means by which cases may be drawn from the ordinary courts and sent for determination to the chancellor, who is "ever a principal counsellor and instrument of monarchy, of immediate dependence upon the king: and therefore like to be a safe and tender guardian of the regal rights"; cp. Gardiner, History of England iii 2.

[2] Vol. iv 188-189.



In the first place, I shall say something of his character and career. In the second place, I shall describe his writings, and endeavour to estimate their merits and defects; and, in conclusion, I shall attempt to summarize shortly his influence on the development of English law in the succeeding centuries.

### *Coke's Career and Character*[1]

Coke's career falls into three well marked periods. The first extends to his appointment to the bench in 1606, the second to his dismissal from the bench in 1616, and the third to his death in 1634.

Coke was born on February 1, 1551-1552. He was educated at Trinity College, Cambridge; and throughout his life he never ceased to be an ardent advocate of a University education,[2] and an enthusiastic admirer of the excellencies of his University.[3] On January 21, 1571, he became a member of Clifford's Inn, from whence in the following year (April 24, 1572) he proceeded to the Inner Temple. He was called to the bar on April 20, 1578, and soon acquired a large practice. He was fortunate in attracting the attention of Burghley, whose influence, aided by his own industry and learning, helped him to enter and to rise,

[1] The principal authorities are Coke's own writings; Spedding, Letters and Life of Bacon; Bacon's professional works, vol. vii of Spedding's Ed.; the State Papers Domestic; Gardiner, History of England; Parliamentary History; Rushworth vol. i; G. P. Macdonell's Life in the Dict. Nat. Biog.; Foss, Lives of the Judges. The most authentic record of the dates in Coke's life is to be found in Harl. MS. 6687, which contains, besides a copy of Littleton's Tenures much annotated, many personal notes of his family history; these notes are printed in Coll. Top. et Gen. vi 108-122; and cp. Hist. MSS. Com. 9th Rep. App. Pt. II. 372 no. 727.

[2] The student, he says, should come from one of the Universities to the study of the common law, as there he learns "the liberal arts and especially Logick: for that teacheth a man, not only by just argument to concludè the matter in question, but to discern between truth and falsehood, and to use a good method in his study," Co. Litt. 235b.

[3] See Bonham's Case (1610) 8 Co. Rep. at f. 116b, where Coke went out of his way to sing the praises of Oxford and Cambridge; "no comparison was to be made between that private college (The College of Physicians) and either of the Universities of Cambridge and Oxford, no more than between the father and his children, or between the fountain and the small rivers that descend from it; the university is *alma mater* from whose breasts those of that private college have sucked all their science and knowledge."

rapidly in the service of the state. On April 2, 1586, he was made recorder of Norwich; and on October 14, 1591, recorder of London. On June 11, 1592, he became solicitor-general; on February 19, 1592-1593, speaker of the House of Commons; and from March 24, 1593-1594—June 30, 1606, he held the post of attorney-general. By the year 1601 he had become sufficiently distinguished and wealthy to entertain Elizabeth at his house at Stoke Pogis, and to present her with jewels to the value of £1000.[1]

It was during this period that he was accumulating the material for those books which were destined to leave so deep a mark upon the common law; and it was towards its close that the first volumes of his reports were published.[2] They made it clear that, in an age of learned lawyers, their author was easily pre-eminent. Nor is the cause of his pre-eminence far to seek. His vast capacity for work, his zealous and positive temperament, his narrow and powerful intellect, were devoted exclusively to the study and practice of the law.[3] He was, as all great lawyers must be, a student of human nature; and he was neither devoid of social gifts,[4] nor wholly unread in classical literature.[5] But all his gifts and all his reading were pressed into the service of the common law. He was, it is true, keen in the pursuit of wealth and power;[6] but these tastes as yet assorted well with his keenness in pursuit of legal knowledge. The time had not yet come when he was compelled to choose between his love of power and his love for the law. When it came he did not hesitate in his choice.

As solicitor and attorney-general he was an officer of state as well as a lawyer; and the fact that he had been an officer of state in the latter years of Elizabeth's reign, left a lasting impression upon his character. Hatred of Roman Catholics, reverence for the crown as the visible embodiment of the state, brutality to prisoners charged with treason or sedition, were

[1] Chamberlain's Letters (Camd. Soc.) 118—"She made a step to Mr. Atturney's at Stoke, where she was most sumptuously entertained and presented with jewells and other gifts to the value of a thousand or twelve hundred pounds."

[2] Below 461.

[3] "*Scribe sapientiam tempore vacuitatis tuæ* saith Solomon. And yet he that at length by these means shall attain to be learned, when he shall leave them off quite for his gain or his ease, soon shall he lose a great part of his learning: Therefore I allow not to the student any discontinuance at all, for he shall lose more in a month than he shall recover in many," 1 Co. Rep. Pref.—throughout his life Coke practised what he here preaches.

[4] Below 434.

[5] Below 458-459.

[6] His first wife Bridget Paston—of the family of the Paston letters—brought him £30,000; and he constantly added to it by the careful manner in which he invested his large professional gains, see Fuller, Worthies, Norfolk 250, cited Dict. Nat. Biog.



characteristics common to many Englishmen of this period; and they were usually strongly marked in those who, by reason of their official positions in the state, knew the dangers to which both queen and state were constantly exposed. But in Coke they appeared in an exaggerated form, and manifested themselves in so ferocious a treatment of the prisoners which he was called upon to prosecute, that even his contemporaries were occasionally disgusted. His conduct at Raleigh's trial is a permanent stain on his memory.[1] There is no doubt too that, at this period of his career, his zeal for queen and state led him to consent to and even to defend acts which in his later days he denounced as illegal. We have seen that his views as to the legality of torture changed, when the development of the constitutional controversies of the seventeenth century led him to deny the existence of that extraordinary discretionary power of the crown which he had once admitted.[2] For the same reason he changed his views upon such topics of public law as the proper sphere of royal proclamations,[3] the validity of benevolences[4] and impositions,[5] the legality of commitments by the Council,[6] the legality of asking the judges to give extra-judicial opinions

[1] (1603) 2 S.T. 1; see the passages at pp. 25, 26, cited by Stephen, H.C.L. i 333 n. 2; as Stephen says—"the extreme weakness of the evidence was made up for by the rancorous ferocity of Coke, who reviled and insulted Raleigh in a manner never imitated, so far as I know, before or since in any English court of justice, except perhaps in those in which Jefferies presided"; in the course of the trial Cecil interposed to check Coke—"Be not so impatient, good Mr. Attorney, give him leave to speak," whereupon Coke told him that he was encouraging traitors, and "sat down in a chafe and would speak no more, until the Commissioners urged and entreated him."

[2] Above 185 nn. 5 and 10.

[3] See his notes on the Prerogative in S.P. Dom. 1598-1601 521, cclxxvi 81—Among other things the Queen may levy rates for the repair of bridges, etc., impose restraints on the landing of goods for the better collection of the customs, and "prohibit things hurtful to the state"; cp. these views with those expressed in the Case of Proclamations (1611) 12 Co. Rep. 74; vol. iv 296-297; below 433.

[4] In the case against Oliver St. John in the Star Chamber in 1614 for refusing to contribute to, and for denying the right of the king to ask for a benevolence, Coke, though he had at first denied the legality of such a request, upheld it, on the ground that there was no law to prevent the king from asking for a free gift, and that the statute 1 Richard III. c. 2 only applied to exactions, Spedding, Letters and Life of Bacon v 146; Gardiner, History of England ii 266; cp. 12 Co. Rep. 119, where it is said that a similar distinction was drawn by all the justices and barons; but in 1628 he denounced "all loans demanded against the will of the subject," Rushworth vol. ii Pt. I. 497;—he had come to see that all these loans and benevolences were cloaks for unparliamentary taxation.

[5] Among Coke's papers seized in 1634 there was found an argument in favour of impositions, S.P. Dom. 1634 351, cclxxviii 35; this must have been composed before 1610, as at that date he had argued against them, ibid 1607-1610 621, lv 52; in 1614, when the Lords asked the advice of the judges on the bill against impositions proposed by the Commons, they declined to advise, as they might be called on to decide the matter judicially, Gardiner, op. cit. ii 241, 242; this refusal, as Spedding says (Bacon's Letters and Life v 59), showed the Lords that Coke would not defend the right to impose; on the whole question of impositions see vol. iv 335-338; vol. vi 42-48

[6] Below 450.

upon pending cases.[1] But though in the earlier part of his life he attributed to the crown a discretionary power which he denied in later years, at no time in his life had he ever wavered in the belief that the common law was a well nigh perfect system —the foundation upon which, not only the public and private rights of Englishmen, but also the very being of the English state depended.[2]

When, therefore, in 1606, he became chief justice of the Common Pleas he obtained a post which was entirely congenial to him.[3] For the first time he was able to give free play to his ideas as to the position of the common law in the state. But these ideas assorted badly with the claims made by the rival courts and the rival bodies of law which were treading upon the heels of the common law; and they assorted even more badly with the claims made by James I. to decide for himself all these conflicts of jurisdiction. According to Coke's view, the common law was the supreme law in the state, and the judges, unfettered and uncontrolled save by the law itself, were the sole exponents of this supreme law.[4] According to James I.'s view the judges were, like other civil servants, the officers of the crown. The crown could therefore supersede them if necessary, and decide any matter for itself.[5] The prerogative was in the last resort supreme in the state. Thus, if a conflict of jurisdiction arose, it was for the king and not for the common law courts (who were usually one of the parties to the quarrel) to settle the dispute; while, if the king's interests were affected by any pending proceeding, he claimed the right to withdraw the matter

[1] Spedding, Bacon's Letters and Life v 114-118, gives a very clear account of the evolution of Coke's ideas on this matter; he shows that in 1614 he did not object to give such opinions; that Y.B. 1 Hy. VII. Trin. pl. 1 cited by him, Third Instit. 29, was no authority for his general proposition that "the judges ought not to deliver their opinions beforehand of any criminal case that may come before them judicially"; and that this conclusion was probably the result of his newly discovered principle that the judge ought to be counsel for the prisoner, above 192; but it would appear that an opinion in favour of this view was growing up; in the Autobiography of Bramston (C.S.) 54, the judges in 1629 refused to answer one of the king's questions as to their jurisdiction over words spoken by Sir J. Eliot in Parliament, as the matter might come before them judicially; see above 352 n. 2.

[2] See the Preface to vol. ii of his Reports; cp. his view in the Prince's Case (1606) 8 Co. Rep. at f. 22b that it was dangerous to pass private bills to regulate the rights of subjects, because those rights were better adjusted by the courts of law or equity.

[3] The first case which he argued as judge was Sir Moyle Finch's Case (1607) 6 Co. Rep. at p. 70a.

[4] See vol. ii 436 n. 2.

[5] On Nov. 2, 1608, the king had said that he was the supreme judge, "inferior judges his shadows and ministers . . . and the King may, if he please, sit and judge in Westminster Hall in any Court there, and call their Judgments in question. The King beinge the author of the Lawe is the interpreter of the Lawe," Cæsar's notes in Lansdowne MS. 160 ff. 426, 427, 428, cited by Usher, E.H.R. xviii 673.



from their cognizance.[1] It was inevitable therefore, that Coke's tenure of the judicial office should be marked by a series of conflicts with the king, which defined the issues between them, and paved the way for his definite alliance with the parliamentary opposition.

His first conflict arose on the question of the relations between the lay and ecclesiastical jurisdictions.[2] This dispute had arisen before he had been raised to the bench. In 1605 Archbishop Bancroft had complained to the Council of the manner in which the jurisdiction of the ecclesiastical courts was hampered by writs of prohibition.[3] Coke signalized his accession to the bench by throwing himself eagerly into the fray in defence of the common law jurisdiction. The Archbishop's complaints were met by a series of assertions that the writs of prohibition complained of were well warranted by the law.[4] In 1607 this controversy entered upon a new phase. A barrister named Fuller had applied to the King's Bench for a prohibition against the court of High Commission, and in the course of his argument he had taken occasion to attack its jurisdiction. Unfortunately for himself, he used words which laid him open to the charge of holding schismatical opinions. On this charge he was fined and imprisoned by the court of High Commission. The judges of the King's Bench, while admitting that the High Commission could punish for schism, denied that it could punish a barrister for anything said by him in his argument; and, in the course of their judgment, asserted in the strongest terms their power to determine the limits of the ecclesiastical jurisdiction.[5]

The common law judges had abandoned Fuller on the technical

[1] See James I.'s speech in the Star Chamber in 1616, cited Spedding, Letters and Life of Bacon v 381-384. The following sentences will make the king's position clear—"Encroach not upon the prerogative of the crown: if there fall out a question that concerns my prerogative or mystery of state, deal not with it till you consult with the king or his Council or both:" all the different courts in the state must keep their own bounds—the common law courts as well as the others, "and this is a thing regal and proper to a king, to keep every court within his own bounds. . . . As for the absolute prerogative of the crown that is no subject for the tongue of a lawyer, nor is it lawful to be disputed. It is atheism and blasphemy to dispute what God can do, good Christians content themselves with his will revealed in his word: so it is presumption and high contempt in a subject to dispute what a king can do, or say that a king cannot do this or that; but rest in that which is the king's will revealed in his law;" see also his speech in 1609, Works 518-519; these were also Bacon's views, see his letter of advice to the king as to the cases of Præmunire in 1615, Spedding, op. cit. v 252-253.

[2] Gardiner, History of England ii 35-42, 122-124.

[3] For these complaints and the replies of the judges see Second Instit. 601-609; vol. i 595 n. 1; the complaints were drawn by Cowell, for whom see above 20.

[4] Second Instit. 601-618.

[5] Nicholas Fuller's Case 12 Co. Rep. 41—"It was resolved that when there is any question concerning what power or jurisdiction belongs to ecclesiastical judges in any particular case, the determination of this belongs to the judges of the common law, in what cases they have cognisance and in what not."

ground that the High Commission had jurisdiction over schism. But they did not abandon their claim to issue writs of prohibition. Bancroft appealed to the king, asserting that the question of the limits of the ecclesiastical jurisdiction, or indeed any other question in which there was a doubt as to the law, could be determined by the king. The judges, he said, were but delegates of the king, and he could at any time withdraw a case from their cognisance, and determine it himself. This was a view with which the king was in thorough agreement.[1] But Coke, with the approbation of the other judges, at once took the opportunity of denying these propositions, and of stating his views as to the supremacy of the common law, and as to rights of the judges to be the uncontrolled interpreters of this supreme law.[2] "The law," he said "was the golden metwand and measure to try the causes of his subjects: and which protected his majesty in safety and peace." "The king in his own person cannot adjudge any case either criminal . . . or betwixt party and party." "The king cannot take any cause out of any of his courts and give judgment upon it himself." "The judgments are always given *per curiam;* and the judges are sworn to execute justice according to the law and customs of England." It is not surprising that the king was angry. His angry reply and Coke's retort defined the real issue which underlay, not only these disputes as to jurisdiction, but also the various disputes between the king and his Parliaments. This means, said the king, that I shall be under the law, which it is treason to affirm; to which, says Coke, I replied that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege.*[3] It is probable, indeed, that he did not come off

[1] Above 428 n. 5.

[2] Prohibitions del Roy (1608) 12 Co. Rep. 63b-65. For the divergent accounts of this episode see Usher, E.H.R. xviii 664-675. It seems likely that Coke, having attended several Council meetings at which the king expressed his views as to the subordination of the law to the king, gave a narrative in which he stated the royal views, added authorities in favour of his own views, and threw it into a literary form which bears little resemblance to the spoken words used on this particular occasion, ibid 674, or the events which really happened, ibid 675; we shall see that he sometimes adopts this course in other parts of his reports, below 464. The correct date of this episode seems to have been Nov. 1, 1608, E.H.R. xviii 670.

[3] The fundamental character of the difference between Coke and the king is well brought out by the writer of the Observation on Coke's Reports; at pp. 11-12, commenting on the Report of Bagg's Case (1616) 11 Co. Rep. 93b, he says—"He doth as much as insinuate that this court (the King's Bench) is all sufficient in itself to manage the state; for if the King's Bench may reform any manner of misgovernment (as the words are) it seemeth that there is little or no use, either of the king's royal care and authority exercised in his person and by his proclamations ordinances and immediate directions, nor of the Council Table, which under the king is the chief watch tower for all points of government, nor of the Star Chamber, which hath ever been esteemed the highest court for extinguishment of all riots and public disorders and enormities; and besides the words do import as if the King's Bench had a superintendency over the government itself, and to judge wherein any of them do misgovern;" for this book see below 478 n. 1.



with such flying colours as his *ex posto facto* narrative suggests.[1] It seems to be certain that he was reduced to humble himself before the king,[2] whose anger was only appeased by the intervention of the lord treasurer.[3] However that may be, it is clear that, though the narrative contained in Coke's report may not be a true account of the actual scene, it does in effect represent truly the issue between the king and himself.

This scene between Coke and the king settled nothing. Again in 1610 the archbishop was complaining of the action of the common law judges. This time the quarrel arose over the question whether the High Commission could imprison for adultery. The judges held that it had no such power, and released on bail one Chancey who had been imprisoned on this ground.[4] Again a conference was held. Some of the judges gave way; but Coke and the judges of the court of Common Pleas could not be shaken.[5] Nor was the breach healed by the issue of a new commission in which Coke and six of the other judges were included. Coke declined to act under a commission as to the legality of which he was not satisfied.[6] It is not surprising to find that rumours were abroad that the king seriously thought of dismissing him.[7]

It is clear that Coke and his fellow judges had given a new turn to the theory of the subordination of church to state expressed in the preamble to Henry VIII.'s Statute of Appeals.[8] It would seem that, in their eyes, the church and its courts were subject not only to the royal supremacy, but also to the control of the common law. Whether such an interpretation carried out the intention of Henry VIII. is more than doubtful. It was

[1] E.H.R. xviii 673, 675.

[2] One account, Sir Roger Boswell's letter to Dr. Milborne ibid 669-670, says that "his Majestie fell into that high indignation as the like was never knowne in him, looking and speaking fiercely with bended fist, offering to strike him etc., which the lo. Cooke perceaving fell flatt on all fower," ibid 670.

[3] Two accounts agree in this, ibid 669-670.

[4] Sir William Chancey's Case (1610) 12 Co. Rep. 82; for the true date, which is incorrectly given as 1612 in this printed book see E.H.R. xviii 666.

[5] High Commission (1611) 12 Co. Rep. 84; E.H.R. xviii 666.

[6] 12 Co. Rep. at pp. 88-89, Coke tells us that the commission was solemnly read, and that it "contained three great skins of parchment, and contained divers points against the laws and statutes of England: and when this was read all the judges rejoiced that they did not sit by force of it"; he refused to take the oath as commissioner; "and all the time that the long commission was in reading, the oath in taking, and the oration made, I stood, and would not sit as I was requested by the archbishop and the lords; and so by my example did all the rest of the justices."

[7] S.P. Dom., 1611-1618 11, lxi 99—Lake, writing to Salisbury, Fel 1611, says—"Two prohibitions granted by Lord Chief Justice (Coke) in two cases c the Church, show his perverse spirit, and unless he can assign good reasons for th m, the king will dismiss him, and no longer be vexed with him."

[8] Vol. i 589-590.

strongly dissented from by James I.;[1] and its correctness was not finally settled till after the Revolution.[2] But whether or no Coke's views as to the control exercisable by the common law were correct, he both seconded and elaborated Henry VIII.'s views as to the continuity of English church history, and as to the subordination of the church to the royal supremacy from the earliest times.[3] The result, therefore, of the victory of Coke's view was to fix firmly these doctrines in English law, and to add to them the doctrine of the subordination of the church and ecclesiastical law to the common law. Historians and ecclesiastical lawyers of the latter part of the seventeenth and the eighteenth centuries elaborated the thesis of the continuity of the history of the English church, without minimizing the royal supremacy, or denying the control of the common law. But modern controversialists, while eagerly assenting to the theory of continuity, have tried to minimize the royal supremacy, and sometimes to reject the control of the law. This modern view, which represents neither the mediæval, nor the Henrician, nor the modern doctrine of the common law, is simply one of the products of the Oxford movement of the nineteenth century.

Though the question of the relation of the ecclesiastical law to the common law was the principal cause of quarrel, it was by no means the only cause. Attacks had been made on the Councils of Wales and the North.[4] There was some reason to suppose that the attack in Parliament on some of the definitions in Cowell's Interpreter, as a result of which the king had been compelled to suppress the work,[5] was instigated by Coke.[6] In 1608 he had been concerned in giving an opinion which considerably restricted the powers which the king by his prerogative could confer upon commissions of enquiry. We have seen that the legality of the powers given to some of these commissions had been a matter of some controversy in the Tudor period.[7] Coke and eight of the other judges now laid it down that, not only was it unlawful to give a commission power to hear and determine offences determinable in the ordinary courts, but that it was also unlawful to give it power only to enquire into these

[1] In Cæsar's notes touching Prohibitions cited E.H.R. xviii 669 it is said—"If these incident causes be tried at comon Lawe, no cause of tithes wil be held in the ecclesiastical Courtes. The Judges are like the Papistes. They alleadge scriptures and will interpret the same. The Judges alleadge statutes and reserve the exposition thereof to themselves."

[2] Vol. vi 222-223.

[3] Caudrey's Case (1591) 5 Co. Rep. 1.

[4] The Case of the Lords Presidents of Wales and York 12 Co. Rep. 50; vol. i 510-512.

[5] Above 22.

[6] Above 429 n. 3; Gardiner, History of England ii 66-67.

[7] Vol. iv 70.



offences.[1] The authority of the report is doubtful, and its sense obscure.[2] It would seem that it means that a commission may be given power to enquire into matters of state, even though that involves incidentally an enquiry into matters triable at common law; but that the direct object of a commission must not be to enquire into any matter so triable.[3] The law on this point was doubtful; the mediæval precedents spoke, as usual, with an uncertain voice; and, as usual, Coke and his brethren made the most of those that supported their view.[4] But here, as in other cases, the later common law has conformed to Coke's view;[5] and in modern times it has been found necessary to give extended powers by legislation.[6] Besides this, in spite of all the efforts of the government, his opinion in the *Case of Proclamations* had been most damaging to the prerogative.[7] A minor cause of difference with the king was his opinion (in which he was probably wrong) that a bishop could not sentence to death for heresy.[8]

[1] Commissions of Enquiry (1608) 12 Co. Rep. 31—The third cause assigned for the illegality of the commission was, "for that it was only to enquire, which is against law, for by this a man may be unjustly accused by perjury, and he shall not have any remedy"; Fourth Instit. 242-243, 245-246; cp. Reid, The King's Council in the North 311-315.

[2] There is a clear misprint in the report which makes it self-contradictory, since it seems to say in another place that a commission to enquire of treason and felony is lawful.

[3] This we can gather from the case of James Whitelocke (1613), Spedding, Letters and Life of Bacon iv 346-357; Whitelocke, Liber Famelicus (C.S.) 34-50, 113-115; 2 S.T. 766; Acts of the Privy Council (1613-1614) 211-217; for his apology see ibid 218-219; in that case Whitelocke was summoned before the Star Chamber for contempt in giving to Sir R. Mansell, the Treasurer of the Navy, an opinion adverse to the legality of a commission to enquire into the administration of the navy; we have not got the exact terms of the commission, but it would seem from the Privy Council records at pp. 212-213 that it was to enquire only; and it may be noted that Coke was present at the hearing as an assessor; cp. Harrison Moore, Executive Commissions of Enquiry Col. Law Rev. xiii 516-517.

[4] Ibid 512-520.

[5] Palmer, who was attorney-general in 1661, seems to have been of opinion that a commission to examine abuses in the Post Office and to determine complaints, was illegal and contrary to Magna Carta, and that therefore the commissioners could not administer oaths, S.P. Dom. 1661-1662 92, xlii 3, 4; the question again came up in connection with the legality of the Municipal Corporations Commission in 1833, and of the Oxford University Commission in 1850, Col. Law Rev. xiii 506; though the legality of the later commission was asserted by the law officers of the crown, they admitted that a commission to hear and enquire into offences without determining them was contrary to law, ibid 507.

[6] Ibid 507, 508.

[7] Vol. iv 296-297; in the Case of Proclamations (1611) 12 Co. Rep. 74 the lord chancellor advised the judges "to maintain the power and prerogative of the king; and in cases in which there is no authority and precedent, to leave it to the king to order in it according to his wisdom . . . otherwise the king would be no more than the Duke of Venice. . . . And all concluded that it should be necessary at that time to confirm the king's prerogative with our opinions, although there were not any former precedent or authority in the law."

[8] The Case of Heresy 12 Co. Rep. 56; Writ de Haeretico Comburendo, ibid 93; Maitland, Canon Law 177-179; vol. i 616-618; cp. Egerton Papers (C.S.) 448, where the Archbishop of Canterbury reports that the differences of opinion among the judges had led to sharp words—Williams J. and Altham B. are said to have told

But it was difficult to attack Coke directly. His unwearied industry, his extraordinary knowledge of the law, his power of eloquent and lucid exposition,[1] and his keenness in doing any duty which he recognized as his duty, made him an invaluable servant of the crown. The somewhat naive enthusiasm which appears in his writings for any view which he is advocating, the quaint and unexpected arguments with which he sometimes enforces it,[2] the transparent genuineness of his convictions, made him personally not unpopular at Court.[3] Prince Charles is said to have delighted in his conversation;[4] and he seems to have regarded the Prince and his mother as his special patrons.[5] He was handsome in appearance, to which he paid some attention;[6] and this always went some way with James I. It was therefore possible to understand and respect him, and at the same time to differ entirely from his political opinions.

Here lay one of the great differences between him and his great rival, Bacon. Coke's main object in life was to know and expound the law. Bacon's main objects in life were the creation of a system of philosophy which few appreciated,[7] and the development of his political views as to the position of the king, which were becoming increasingly unpopular.[8] That he was a skilful lawyer, a great jurist, and an unequalled expositor of the law, his legal arguments and his writings show.[9] But to law he

Coke that "he was not such a maister of the lawe as hee take on him, to deliver what he list for lawe, and to despise all other."

[1] Hawarde, Les Reportes etc. 361, thus describes his argument in Calvin's case (which took a whole day to deliver; ibid 355)—"and so ended his argumente wth greate admyration of the better and wyser sorte, infinite commendacyon of all, and good satysfaction of verye manye; he contynued to the ende wth stronge voyce, excellent memorye, rare delyuerye, and with small or no pertubacyon or alteracyon."

[2] We find this characteristic throughout his writings; I will take one instance from a speech in Parliament in 1620 (Proceedings and Debates in the House of Commons i 263):—he is arguing that the King's Bench is superior to the Chancery; writs, he says, in the King's Bench are coram rege tantum: in the Chancery, coram rege in cancellaria nostra—"Which sheweth that the King's Bench is above the Chancery, for every herald can tell that when there is a small addition, as of a crescent or a martin or the like, in a coat, it sheweth that it is of a younger house."

[3] Thus in Nov. 1616, after he had been dismissed from his post as chief justice of the King's Bench, the king said he was uncorrupt and a good justicer, S.P. Dom. 1611-1618, 407, lxxxix 39; and in Dec. 1616, he spent two hours with the king and was graciously received, ibid 411, lxxxix 59.

[4] It was reported that he used to say that he was never tired of hearing Coke, "he so mixed mirth with wisdom"; cp. ibid 1628-1629, 73, ci 4, where Nethersole reports that the conference with the Lords on the liberty of the subject was well performed by Coke, "with some mixture of mirth according to his manner."

[5] Ibid 1611-1618 376, lxxxvii 73; ibid 404, lxxxix 17; ibid 413, lxxxix 80.

[6] Fuller, Worthies, Norfolk, 251 (cited Dict. Nat. Biog.) says—"the jewel of his mind was put into a fair case, a beautiful body, with a comely countenance, a case which he did wipe and keep clean, delighting in good cloathes, well worne, and being wont to say, that the outward neatness of our bodies might be a monitor of purity to our souls."

[7] Above 242. [8] Vol. vi 24-26. [9] Above 246-250.



gave only the remnants of his time. That he would have been a greater lawyer than Coke if he had devoted all his energies to law, few can doubt. That in fact his influence upon the law both in his own day and in the succeeding ages was incomparably less is equally certain. In his own day men distrusted him, because they could not understand him as they understood Coke; and though they might agree with his political opinions, they never gave him the respect which comes of understanding.

Therefore the king, though he was angry with Coke, hesitated to deprive himself of his services. Moreover, there was another and a more powerful reason why he should hesitate to do anything which could be construed as a punishment for Coke's conduct on the bench. It was quite clear that his fanatical reverence for the common law was an intensified expression of a deep-seated national sentiment.

The reverence felt for the common law in the Middle Ages[1] had been not only maintained, it had been increased during the Tudor period. In fact, the Tudor sovereigns had owed a large part of their popularity to the fact that they really felt the same reverence for it as the majority of their subjects.[2] And the results of Elizabeth's reign had confirmed men in their belief that it was their most priceless possession. It was therefore natural that, whenever a person felt himself aggrieved, he should appeal to that law; and it was inevitable that, when a Parliamentary opposition began to make its voice heard, it should make the same appeal.[3] But the parts of the common law relating to the powers of the crown were particularly obscure;[4] and, up to this period, these appeals to the common law by those who thought themselves aggrieved by some act of the crown had not met with much success. Neither those who had attacked the legality of the court of Star Chamber,[5] nor those who had attacked the legality of customs duties imposed by the crown,[6] nor those who had attacked the legality of commissions of enquiry,[7] had met with much encouragement. But the growth of the Parliamentary opposition, and the arguments used by leading members of that opposition, encouraged the belief that in the common law there might be found a store of principles which could be used to demonstrate the illegality of particular exercises of arbitrary power. The manner in which

[1] Vol. ii 417, 435-436, 477.

[2] Vol. iv 201, 283; as Bacon wrote, in his letter of advice to Villiers, Spedding, Letters and Life of Bacon vi 33—"the people of this kingdome love the laws thereof, and nothing will oblige them more than an assurance of enjoying them; what the Nobles once said upon occasion in Parliament *Nolumus leges Angliæ mutare*, is imprinted in the hearts of all the people."

[3] Vol. vi 103. [4] Vol. iv 202-209. [5] Vol. i 512-513.

[6] Vol. iv 105; vol. vi 42-46. [7] Above 432-433.

the great question of monopolies had been dealt with seemed to justify this belief. Their legality was left to be tried at common law; and the common law had condemned all those which had aroused the greatest complaints.[1] But the crowning proof of the justice of this belief had been Coke's conduct on the bench. He, the greatest master of the common law, the most honest and incorruptible of men both in his public and private life,[2] had, it seemed to the popular mind, demonstrated from book-case and record that the mediæval common law was the greatest safeguard against arbitrary power. Thus, as Spedding has said, the most offensive of attorney-generals had been transformed into the most admired and venerated of judges.[3]

To deal rashly with such a man was dangerous. There was some talk of making him Treasurer;[4] and, as he was regarded as an authority on matters of finance,[5] this would perhaps have been the best solution. At any rate it would have removed him from the sphere of the courts, where his pre-eminence was acknowledged, and his popularity was daily increasing. But this resolution was not taken; and instead, on the advice of Bacon, it was decided to make him chief justice of the King's Bench.

Bacon seems to have thought that to remove him from a court which was specially concerned in safeguarding the rights of the people, to a court where his special concern was to look after the rights of the king, would diminish his capacity for harm. It would be a kind of discipline to him; and he did not forget that

[1] Vol. iv 349-353.

[2] Whitelocke, Liber Famelicus (C.S.) 50 says of Coke—"Never man was so just, so uprighte, free from corruption, sollicitations of great men or frendes, as he was. Never put counsellors that practised before him to annuall pensions of money or plate to have favour. In all cawses befo e him the counselor might assure his clyent from the danger of briberye, the secret mischiefs growing by wife, children, servan s, chamber motions, courteours great or smale, and the most religious and orderlye man in his house that lived in our state. Thear grew sum smale questions between him and sum of his tenants at Stoke about copies. He sent for me, prayed me to keep his court, and to order all things as I sholde see cawse in justice, upon view of his rolles and that he wolde be contented with what I determined withe him or against him. And accordinglye I did keepe his court . . . and gave good satisfaction to those that made clamour against him."

[3] Letters and Life of Bacon iv 379; in June, 1616, Chamberlain wrote to Carleton that if Coke falls "he will be honoured as the martyr of the commonwealth," S.P. Dom. 1611-1618, 375 lxxxvii 67.

[4] Ibid 216, lxxv 52—Chamberlain writes to Carleton Dec. 1613, that Coke rivals the earl of Northampton for the Treasurership.

[5] This was Bacon's opinion; writing to the king in 1615 to advise what should be done to Coke in consequence of his attack on the Chancery, he says—"my opinion is plainly, that my Lord Coke at that time is not to be disgraced, both because he is so well habituate for that which remaineth of these capital causes, and also for that which I find is in his breast touching your finances, and matters of repair of your estate"; in 1615 he took a prominent part in a consultation in Council as to payment of the king's debts and lessening expenses, ibid 310, lxxxi 115—in the end he recommended a Parliament, and no tampering with elections; for a fuller report see Spedding, Letters and Life of Bacon v 199-200.



this scheme opened the way to his own promotion to the post of attorney-general. This post he was certainly better qualified to fill than Hobart, who was to be removed to Coke's place in the Common Pleas. Bacon's advice showed some insight into Coke's character. As his writings and his acts show, he had essentially the mind of an advocate. He could always find arguments, and arguments fortified with abundant precedents, for a cause which he was retained to defend. It is clear from Hawarde's reports that he was a valued and respected member of the court of Star Chamber.[1] If he was retained for the king, he might yet, so Bacon thought, be a tower of strength to the crown. With Coke as chief justice of the King's Bench occupied in protecting the rights of the crown, and with himself as attorney-general advocating the rights of the crown, whenever they were brought into question, all might yet be well. At the same time, he advised that Coke's hopes should be excited by the prospect of being admitted to the Privy Council, if his conduct on the bench gave satisfaction.[2]

But Bacon had not taken a sufficiently comprehensive view of Coke's character. No doubt Coke was an able and even an unscrupulous advocate for any cause which he was retained to defend. But, since his elevation to the bench, the question of the position of the common law in the state had become acute; and his views as to its supremacy had become a settled belief not wholly devoid of fanaticism. To suppose that because Coke as attorney-general had given opinions and done acts favourable to the maintenance of the prerogative, Coke as chief justice of the King's Bench would revert to his old views, was to betray a profound ignorance of the manner in which Coke's views had developed during the past

[1] Thus in 1606, in a case which turned upon the practices of merchants dealing in tin, Coke had taken a good deal of trouble in getting up the facts and the law; and the lord chancellor moved, "that forasmuch as the Lo. Cheife Justice of the Common Place had taken greate paines and delyvered manye excellente things touchinge the king's interest in matters of tinne, and those of greate antiquitee, whereof the world never took knowledge before, that one of the Kinge's Counselle shoulde attend his best leysure for the settinge them downe to the end they may be inserted in the Order," Les Reportes etc. 308.

[2] Spedding, Letters and Life of Bacon iv 381-382—"First it will strengthen the king's causes greatly amongst the judges. For . . . my Lord Coke will think himself near a privy counsellor's place, and thereupon turn obsequious. . . . Secondly, the attorney (Hobart) sorteth not well with his present place, being a man timid and scrupulous . . . whereas the now solicitor (himself) . . . is like to recover that strength to the king's prerogative which it hath had in times past, and which is due unto it. . . . It is not to purpose for the judges to stand well disposed, except the king's counsel, which is the active and moving part, put the judges well to it; for in a weapon what is a back without an edge? . . . Besides the remove of my Lord Coke to a place of less profit (though it be with his will) yet will be thought abroad a kind of discipline to him for opposing himself in the king's causes, the example whereof will contain others in more awe;" we have seen, above 436 n. 5, that Bacon considered him a good judge in criminal cases.

few years; and to suppose that the prospect of a privy councillor's place would make any difference to his conduct was even more absurd. It was with difficulty that he was induced in October, 1613, to consent to his promotion;[1] and to soothe him he was immediately made a member of the Privy Council.[2] He no doubt saw that the change would mean further contests with the king; and, though he was not the man to shrink from a fight, he did not like fighting with the king, for whom he felt all the reverence of the Tudor statesman.[3]

The king soon found that Coke's capacity for mischief had been increased instead of being diminished by his promotion. The three years during which he held his new office were marked by three quarrels upon fundamental questions of constitutional law.

In *Peacham's Case*, in 1615, Coke laid it down that it was contrary to law to ask the judges separately to give their opinions upon the question whether certain acts charged against an accused person amounted to high treason. He did not as yet affirm that the judges ought not to be consulted at all concerning a pending case. But he maintained that, if consulted, they should be consulted in a body. It was not till a later period that he denied the right of the crown to consult the judges at all as to a case which might come before them judicially.[4] It was with difficulty that Coke could be induced to give an opinion; and, ultimately, the opinion he gave was unfavourable to the royal view, that Peacham's acts amounted to high treason.[5] Shortly after this episode occurred Coke's famous quarrel with Lord Ellesmere as to the jurisdiction of the court of Chancery.[6] We have seen that the claims made by Coke were baseless, that he behaved with unnecessary violence in his attempt to make a wholly abusive use

[1] S.P. Dom. 1611-1618 202, lxxiv 86—Letter of Chamberlain to Carleton; ibid 89, in another letter, he says—"Sir Edw. Coke called up to the Chief Justiceship of the King's Bench, to his own regret and that of all the officers of the Common Pleas. Sir Fras. Bacon made Attorney General; it is feared he will prove a dangerous instrument."

[2] Ibid 205 lxxv 4.

[3] Above 426; Whitelocke, Liber Famelicus (C.S.) 48 tells us a tale which illustrates this—"As I went with him, I asked him why he stayed not at the court to dynner. He told me, that whilest he stood by the king at dynner, he wolde ever be asking of him questions of that nature that he had as life be out of the roome, and that made him be as far of as he mighte even at sutche times. I gesse it was concerning matters of his prerogative, whiche the kinge wolde take ill if he wear not answered in them as he wolde have it."

[4] Above 428 n. 1.

[5] Spedding, Letters and Life of Bacon v 114-118, above 428 n. 1; for the king's views on the matter see ibid 105-106; for an account of Coke's opinion see ibid 120-121.

[6] Ibid v 245-254, 385-398. The best discussion and vindication of the decree in favour of the Chancery as against Coke's objections, which were made later in Third Instit. 123-125, and Fourth Instit. 86, will be found in Collect. Jurid. i 23-78.



of the statute of Præmunire, and that he deservedly failed to accomplish his objects.[1]

The third and by far the most important quarrel arose on the question of the king's right to stop or delay proceedings in the common law courts by the issue of the writ *de non procedendo rege inconsulto*. The court refused to stop the proceedings summarily on the production of the writ; and the case in which the question arose, after being elaborately argued (Jan. 1615-1616), was left for a time undecided, and in the end was compromised.[2] It was probably a wise step to compromise it, as the case turned upon the right to appoint to an office in the court of Common Pleas—a matter upon which the common law judges had always been sensitive.[3] Obviously the king would have a better chance of getting a decision on the general question favourable to himself if the case did not so directly concern the judges, and if it turned upon facts which were not covered by recent authority. It was not long before such a case arose. A few months later the court refused to delay the hearing of a case concerning the question of the right to present to a living, which the king had given to a bishop to be held in commendam with his bishopric.[4] Under the influence of Coke, the judges wrote a letter to the king defending their action; and it was clear from this letter that the judges were inclined to deny or to limit the prerogative of the king to control the conduct of cases pending before his courts in which his interests were at stake.[5] It followed that, unless they were checked, they would make good their claim to determine the limits of the prerogative. In June, 1616, all the judges were summoned to a meeting of the Council, and the enormity of their conduct was explained by the king himself. Coke alone attempted to defend the letter. The other judges submitted, and promised to protect

[1] Vol. i 461-463.

[2] The best account will be found in Bacon's Works (Ed. Spedding) vii 683-686; it is reported by Moore 842 *sub nomine* Brownloe v. Cox and Mitchell; by Bulstrode, 3 Buls. 32, where it appears as Brownlow v. Cox and Mitchell; and in 1 Rolle's Rep. 188, 206, 288; for Bacon's argument which "lost not one auditor that was present in the beginning," and won praise from Coke, see Works (Ed. Spedding) vii 687-725.

[3] Vol. i 260-261.

[4] The Case of Commendams, Hobart 140 *sub nomine* Colt and Glover v. Bishop of Coventry; Moore 898; 1 Rolle 451; for an account of the proceedings taken in consequence of the judges' action see Collect. Jurid. i 1-19; cp. Spedding, Letters and Life of Bacon v 352-354.

[5] "We hold it our duties to inform your majesty that our oath is in these express words: *that in case any letters come unto us contrary to law, we do nothing by such letters, but certify your majesty thereof, and go forth to do the law notwithstanding the same letters.* We have advisedly considered of the said letters of Mr. Attorney and with one consent do hold the same contrary to law. And therefore . . . we have according to our oaths and duties, at the open day prefixed the last term proceeded," Collect. Jurid. i 8-9; it is clear that on this matter the early cases were very conflicting, vol. ii 561-564; but there were later precedents in favour of Coke's view, above 348.

the king's prerogatives both in the pending *Case of Commendams* and for the future.[1]

On the 26th of June Coke was again summoned before the Council, and asked what he had to say in defence of his conduct in encouraging proceedings under the statute of Præmunire against those who had applied to the chancellor for injunctions against the proceedings of courts of law, and in the other matters in which he had given offence to the king.[2] His defence in respect of the first point practically amounted to a promise not to offend again in that particular way. But his answers in respect of the other matters were so little satisfactory to the king that he was suspended from the Privy Council, forbidden to go on circuit, and ordered to spend his leisure in revising and correcting his reports.[3] His revision of his reports practically amounted to a denial that they contained any serious errors.[4] Later on, his attention being called to five specific points, he admitted that they contained certain opinions as to the prerogative which were open to misconception; and he explained them in a manner satisfactory to himself,[5] but not at all satisfactory to the king.[6] He concluded by asking the king to refer these points to the judges, and also to ask them to certify what cases he had published for the maintenance of the prerogative, for the good of the church, for the quieting of men's inheritances, and for the general benefit of the commonwealth.[7] James saw clearly enough that Coke's views as to the position of the common law in the state, and its relation to the king, were too fundamentally different from his own to allow him to sit again as chief justice. On November 14, 1616, he was dismissed from his office. Chamberlain's view that the four P's—Pride, Prohibitions, Præmunire, and Prærogative—were the

[1] Collect. Jurid. i 5-19.

[2] Spedding, Letters and Life of Bacon v 398; cp. Gardiner, History of England iii 23.

[3] Spedding, op. cit. v 399.

[4] Ibid vi 76-77—"His speech was that there were of his Reports eleven books that contained about five hundred cases: That heretofore in other Reports, as namely those of Mr. Plowden (which he reverenced much) there hath been found nevertheless errors which the wisdom of time had discovered and later judgements controlled: and enumerated to us four cases in Plowden which were erroneous; and thereupon delivered in to us the enclosed paper, wherein your Majesty may perceive that my Lord is an happy man, that there should be no more errors in his five hundred cases than in a few cases of Plowden."

[5] See the objections and answers printed in Bacon's Works (ed. 1824) vi 397-408; for the small book entitled "Observations on Coke's Reports attributed to Egerton" see below 478 n. 1.

[6] See the document entitled "Remembrances of His Majesty's declaration touching the Lord Coke" drawn by Bacon, Spedding, Letters and Life of Bacon vi 94-96; the innovations with which the royalist lawyers charged him are collected in another paper of Bacon's entitled "Innovations introduced into the Laws and Government," ibid vi 90-93.

[7] Bacon's Works (ed. 1824) vi 409: cp. Spedding, Letters and Life of Bacon vi 89.



causes of his dismissal was substantially correct.[1] The chancellor's speech to his successor made it quite clear that no lawyer who held the views of Coke could ever hope to be raised to the bench. His fate was to be "a lesson to be learned of all, and to be remembered and feared of all that sit in Judicial places."[2]

The fall of Coke was marked by an open letter to him written by a candid yet, on the whole, a sympathetic friend.[3] It is remarkable both for the light which it throws on his character, and for the advice which it contains. The writer evidently sympathizes with his religious and political views—with his hatred of Rome, and with his stand against arbitrary authority. He is clearly a Puritan who recognizes the great services which Coke's legal knowledge had done, and yet might do, to the cause of religion and the constitution. He had evidently studied Coke's character closely, and was quite alive to his faults. "In discourse," he says, "you delight to speak too much," and "by this sometimes your affections are entangled with a love of your own arguments, though they be the weaker." "While you speak in your own element, the law, no man ordinarily equals you; but when you wander, as you often delight to do, you wander indeed"—a criticism which would seem to show that his literary style is a faithful reflection of his manner of speech. He accuses Coke of conversing too much with books, too little with men who are his equals. He is too apt to blame or praise excessively on slight grounds. He uses his legal knowledge to make the law lean too much to his opinion—a bad example to the student. Though a rich man, he gives little or nothing to the poor—not even to his own tenants. His conduct of the Overbury case in which, from the bench, he had thrown out wild and wholly baseless hints of a plot which had had something to do with the death of Prince Henry,[4] is censured, because he had announced

[1] "The common speech is that four Ps have overthrown and put him down—that is Pride, Prohibitions, Praemunire, and Praerogative," Chamberlain to Carleton, Nov. 14, 1616, cited Spedding, op. cit. vi 87.

[2] The lord chancellor's speech to Mountague when he was sworn chief justice of the King's Bench, Moore 827; the king's speech in the Star Chamber (above 429 n. 1) was referred to as laying down the precepts that a judge should follow, and the faults in Coke's Reports were pointed out in detail.

[3] The letter is printed in Bacon's Works (ed. 1824) v 403-411; Spedding, Letters and Life of Bacon vi 121-131 gives conclusive reasons against the view that it was written by Bacon; his conclusion is that it was written by "some zealous Puritan who wished to see Coke reinstated in order that he might be again the great enemy of the Papists, and the great champion of the commonwealth against the crown"; and Gardiner had also come independently to the same conclusion.

[4] At the arraignment of Monson (2 S.T. 949, 950) he threw out hints of a great Popish plot, and is said even to have hinted that this plot had had something to do with the death of Prince Henry: the whole foundation for this seems to have been some hints dropped by Franklin, who, as Spedding says (Letters and Life of Bacon v 338), "had discovered the soft place in Coke's head." The evolution of the theory of a vast Popish plot in Coke's mind, and its source, can be traced from the

his suspicions too precipitately. Finally, he is advised to walk circumspectly, and, by so doing, to regain a position in which he can renew his efforts to serve both church and state. That Coke was to some extent influenced by this advice, the third, and in some respects the most admirable, part of his career will show.

From 1616-1620 Coke seems to have entertained hopes that he might again gain the favour of the king and be restored to place and power. An opportunity seemed to offer itself in the prospect of a marriage between Sir John Villiers, the elder brother of Buckingham, and Frances, his youngest daughter by his second wife Lady Elizabeth Hatton.[1]

Coke had married his second wife on November 6, 1598. She was the granddaughter of Burghley, and a wealthy heiress; and there were some who were surprised that she had condescended to marry one who was merely a successful lawyer.[2] Doubtless Coke's wealth attracted her, and led her to prefer him to his great rival Bacon. Bacon had no cause to envy Coke's success. The marriage had been celebrated in an irregular manner which had involved them both in a prosecution before the ecclesiastical courts,[3] and this had given rise to a good deal of baseless scandal.[4] Their subsequent relations had been notoriously unsatisfactory—each of them was unsuited to the other. Though Lady Hatton had supported her husband just before his fall,[5] after he had been dismissed she deserted him.[6] Therefore

following entries in the State Papers—In October, 1615, Coke notes that "Sir A. Mainwaring, the Prince's carver, lay at Mrs. Turner's house when the prince sickened," S.P. Dom. 1611-1618 324, lxxxii 128; in November Mrs. Turner says she has heard that the prince was poisoned, ibid 327, lxxxiii 21; later in November Franklin hints at a great plot involving the prince, the Palgrave, and Lady Elizabeth, ibid 334, lxxxiii 74; in December Coke writes to the king that "something is still behind which must not be trusted to writing," ibid 337, lxxxiv 19; then came Coke's injudicious remarks reported in the State Trials; the whole episode is a good illustration (1) of Coke's fear of and prejudice against the Roman Catholics, and (2) of the manner in which he rushed to a conclusion on scanty evidence in cases in which his prejudices were enlisted.

[1] Spedding, Letters and Life of Bacon vi 218; for the disastrous way in which this marriage turned out, see Coll. Top. et Gen. vi 122.

[2] Chamberlain's Letters, Temp. Eliz. (C.S.) 29—"The seventh of this moneth (November, 1598) The Quenes Atturney married the Lady Hatton, to the great admiration of all men, that after so many large and likely offers she shold decline to a man of his qualitie, and the world will not beleve that it was without a misterie."

[3] Dict. Nat. Biog. *Coke*.

[4] S.P. Dom. 1598-1601 189, 190, cclxx 102—There were rumours that Lady Hatton was with child by one of her servants before Coke married her, and that "it was no marvel Mr. Attorney wept sitting with the judges, for he has gone up and down ever since his marriage like a dead man discomforted"; however in August, 1599, Chamberlain writes, "The Lady Hatton is brought to bed of a daughter, which stoppes the mouth of the old slander," Chamberlain's Letters, Temp. Eliz. (C.S) 63.

[5] June 22, 1616, Chamberlain writes of Coke that "His lady has solicited much for him, and refuses to sever her interests from his as is desired," S.P. Dom. 1611-1618 375, lxxxvii 67.

[6] November 18, 1616, Sherburn writes—"Lady Hatton has left her husband in his disgrace, taking much of his plate and jewels," ibid 406 lxxxix 33.



the mere fact that Coke had projected this marriage for their daughter was enough to set her against it.

Coke's subsequent action was a disgrace to a lawyer. He took possession of his daughter by violence; and proceedings for riot were very properly taken against him in the Star Chamber.[1] But the Villiers influence procured the abandonment of these proceedings; and the marriage was celebrated.[2] After this episode, all hope of a reconciliation between himself and his wife was at an end. In 1617 she gave a magnificent entertainment to the king and queen at Exeter House, while her husband was living in the Temple and "sending for his diet to goodman Gibbs, a slovenly cook."[3] Even the special request of the King could not induce her to invite him.[4]

Coke gained but little from his connection with the Villiers family. Though in December, 1616, he had been restored to his place in the Council,[5] though there were reports that he would be raised to the peerage,[6] though the lawyers hoped that he might be made chancellor,[7] and though he was again spoken of as Treasurer,[8] the current opinion was that he would make no way against Lady Hatton's influence.[9] Current opinion was right in its prophesy, though perhaps wrong in its reasons. Though Coke was a valuable servant on account of his legal knowledge and his financial skill,[10] James was too conscious of the hopeless difference between his own and Coke's political views ever again to trust him with an important office.[11] He was made one of the

[1] Camden Miscell. vol. v 3-6—a letter of the Council to Sir Th. Lake relating Coke's proceedings and the action taken thereon.

[2] Spedding, Letters and Life of Bacon vi 217-257.

[3] S.P. Dom. 1611-1618 497, xciv 29.

[4] Ibid 495, xciv 23—"Lady Hatton has entertained the king, and at his request settled £2,500 per ann. on Lady Villiers, but she refused to be reconciled to Sir Edw. Coke, saying if he came in at one door she would go out at another"; in July, 1621, it is true, the king was reported by Chamberlain to have reconciled them, ibid 1619-1623 275, cxxii 23; but it was a very transient reconciliation, as in December Chamberlain writes that she was suspected of instigating a plot to take proceedings in the Star Chamber in order to ruin Coke, ibid 316, cxxiv 2.

[5] Ibid 1611-1618, 412, lxxxix 67.

[6] Ibid 489, xciii 133; ibid 1619-1623 49, cix 61.

[7] Ibid 1611-1618 432, xc 55; later Chamberlain writes that "Had Lord Coke consented to marry his daughter with Sir John Villiers he might have been chancellor, but he stuck at £10,000 and £1,000 a year, saying he would not buy the king's favour too dear," ibid 447, xc 122.

[8] Ibid 566, xcvii 89.

[9] Ibid 494, xciv 11, Sherburn writes—"Sir Edward Coke does not advance, nor will without his wife's influence, which she will not use for his honour; Carleton wrote—"Lord Coke is tossed up and down like a tennis ball," ibid 489, xciii 135.

[10] Thus in 1619 Chamberlain reports that he is "missed from the Exchequer Chamber, and wanted in the Star Chamber to supply the Lord Chancellor's place when he is ill," ibid 1619-1623 1, cv 2; cp. Spedding, Letters and Life of Bacon vii 61.

[11] In December, 1616, Sherburn had reported that the king had promised to give Coke some service, "though thinking him unfit for the Chief Justiceship," S.P. Dom. 1611-1618 412, lxxxix 68.

commissioners for executing the office of the Lord Treasurer; but he was passed over, when the office was filled in 1620, in favour of Mountague, his successor in the office of chief justice of the King's Bench.[1]

It was in the Parliament of that year that Coke appeared in his new character of leader of the Parliamentary opposition. He had been returned by a Cornish borough by the king's command.[2] But his political opinions were fundamentally opposed to those favoured at court; and, to a man of his strong Protestant views, the concessions made by the king to the Roman Catholics, in order to secure the Spanish match, must have been wholly abhorrent. On the other hand, with the political and religious views of the leaders of the Parliamentary opposition he found himself in entire sympathy. With his characteristic impetuousness he did what perhaps the writer of the letter of advice foresaw in 1616 that he was bound sooner or later to do—he made a complete change of front; and it is probable that this change of front did more than even his conduct on the bench had done, to further the cause which he had so closely at heart—the cause of the supremacy of the common law. At the cost of some inconsistency in some of his statements of constitutional doctrine,[3] it definitely cemented the old alliance between Parliament and the common law, to which in the past both the common law and the Parliament had owed so much;[4] it gave to the common law its supremacy over its rivals; it enlisted in favour of the Parliament that superstitious reverence which men felt for the common law; and it immensely strengthened that note of legal conservatism, which is at once the distinguishing characteristic of the constitutional struggles of the seventeenth century, and, to a large extent, the secret of their successful issue.

It is not often that a lawyer, who has, during the greater part of his life, been merely a lawyer, becomes a leader of the House of Commons. But the pleasing address which had made him, in spite of his political views, a *persona grata* at court; his intense earnestness for the reformed religion and for constitutional government; his acknowledged mastery of the mediæval common law, when so much turned on the interpretation of doubtful points in that law; his reputation for financial skill; his scrupulous honesty—combined to make him one of the most, if not the most influential man in the House of Commons.[5] In all the stirring

[1] Spedding, Letters and Life of Bacon vii 149.
[2] Dict. Nat. Biog. citing Holkam MS. 727.
[3] Above 427-428; below 450, 456.
[4] Vol. iv 174, 188-189; vol. ii 289-290, 430-434, 441-443.
[5] See Chamberlain's statements in S.P. Dom. 1619-1623 223, cxix 90; 225, cxix 103; 233, cxx 13—"The king has been to day to the Parliament (March 10, 1621); he disapproves Coke's speeches and precedents;" Bacon, writing to Buckingham, March, 1620, as to a pending conference between Lords and Commons, says—"I have doubt only of Sir Edw. Coke, who I wish had some round *caveat* given him from the king."



events of this Parliament—the impeachments of Mompesson, Mitchell, Bacon, and Benet, the agitation against Spain and the Roman Catholics, and the final protestation by the House that their privileges were their ancient and undoubted right—he played a leading part. There were some who could give sounder counsel in questions both of domestic and of foreign policy; and some were more skilful in leading and managing the House of Commons. He was essentially a Tudor statesman, and he hardly realized the changes which were rendering many of the maxims of Tudor statesmanship obsolete. But these limitations tended to give him a greater authority over a House in which the majority held similar views;[1] and in all the questions of public law, which the quarrel with the king involved, none could give such valuable aid as he, because none could speak with such authority as to the existing law. The fact that Coke, the great lawyer and a privy councillor, supported the view which the majority of the House of Commons took of the rights of Parliament, gave a weight to the Parliamentary opposition, which it had never had before. This was the first Parliament, said Alford, an old member of the opposition, in which I have seen councillors of state take such care of the state.[2]

On the other hand, Parliament was quite ready to acknowledge Coke's services by furthering his views as to the supremacy of that law, which, as he now interpreted it, justified their opposition. The enquiries which led to the impeachment of Bacon revealed many abuses in the organization of the Chancery, and led to the proposal of several measures of reform.[3] One of the most remarkable was "An Act for Reversing of Decrees in Courts of Equity on just cause." It provided that at the rehearing of any case in Chancery the two chief justices and the chief baron should be present as assistants to the chancellor. This Act would have given to the common law courts that control over the Chancery which Coke had failed to establish while he was on the bench. Fortunately for the development of equity the opposition of the king was fatal to the bill.[4]

[1] Gardiner, His ory of England v 434, 435—"The Commons stood upon a purely conservative ground. We look in vain amongst their leaders for any sign of openness to the reception of new ideas, or for any notion that the generation in which they lived was not to be as the generation which had preceded it."
[2] Proceedings and Debates in the House of Commons (1766) i 66; cp. Gardiner, op. cit. iv 41.
[3] Proceedings and Debates of the House of Commons (1766) i 109-111—attacks on the officials of the Chancery; ibid 157-160—complaints of Chancery injunctions; ibid 274—a bill to avoid vexation by colour of process taken out of Courts of Equity; cp. ibid 333-334, 344, 351.
[4] Gardiner, History of England iv 109.

they were angry at the favours shown to Jesuits and Arminians. Coke[1] again pointed out that subsidies were not usually granted for the ordinary expenses of government; that it was not necessary to grant further subsidies now, as "there was no enemy yet known;" that the ordinary revenue would suffice, if necessary reforms in the king's government and household were carried out. He called attention to the negligence shown in the administration of the navy—"It was never heard that Queen Elizabeth's navy did dance a pavan; so many men to be prest, and lye so long without doing anything;" and he not obscurely hinted that much was due to the insufficiency of the Duke of Buckingham, the Lord Admiral.[2]

That an attack on Buckingham could not long be delayed was clear even to Buckingham's friends. They endeavoured in vain to induce him to come to terms with the Parliament.[3] Buckingham thought that he might still conciliate Parliament by a promise to enforce the laws against the Roman Catholics, and disarm their criticism by a personal defence of his foreign policy.[4] But the Commons were hardly likely to be influenced by such a display. Coke, though he expressed his personal willingness to give, advised the House not to grant subsidies, and ominously referred to precedents of what had happened to counsellors who misled the king.[5] Further revelations of the manner in which the coasts had been ravaged by pirates embittered the feeling of the House against the Duke.[6] At length he was referred to by name; and the house resolved to lay their complaints of the manner in which he had executed his office before the king.[7] The king's answer to this attack upon his favourite was the dissolution of Parliament.

In the succeeding Parliament (1626) Coke took no part. The king got rid of him, together with five other leaders of the Parliamentary opposition, by pricking them for sheriffs.[8] In

[1] Debates in the House of Commons 1625 (C.S.) 84-87.

[2] Ibid 85—"The office of Lord Admirall is a place of the greatest trust and experience. The office of High Constable has become hereditary. So was never any Admirall. In Ed. 3rd. tyme, it was devided into the North and South. It will be well when offices are restored to men of sufficiencye."

[3] Ibid xvii, xviii.

[4] Ibid 94-102; Gardiner, History of England v 398.

[5] Debates in the House of Commons in 1625 (C.S.) 115—"Sir Edward Coke made a long discourse of the leake in the Kinge's estate, of the qualityes of a counsellor, of the danger to great men if they misledd the king . . . and voucht the president of Hugo de Burgo . . . of Segrave . . . John of Gaunt, and Lord Latimer, of Suffolk."

[6] Ibid 116, 117.

[7] Ibid 118, Sir Francis Seymour said—"Let us lay the fault where it is; the Duke of Buckingham is trusted, and it must needs be either in him or his agents."

[8] Gardiner, History of England vi 33—besides Coke, Seymour, Phillips, Alford, and Palmer were thus excluded.



spite of his protests,[1] he was forced to acquiesce in his exclusion from the House, though he continued to be otherwise privileged as a member of Parliament.[2] He himself in 1621 had stated that a sheriff could not sit in Parliament.[3]

The new Parliament was no more compliant than the last. Led by Eliot, it went on where its predecessors had left off, and, after some enquiry into the past misgovernment, it impeached Buckingham. It soon became clear that nothing less than the dismissal of Buckingham would satisfy the Commons, and Parliament was therefore again dissolved in order to save him.[4]

Though Coke was now seventy-seven years of age, he could not be idle. He used his time to finish the first three books of his Institutes, and to collect materials for his fourth book.[5] But the epilogue to his fourth book lets us see that his years were at last beginning to tell upon him. "Whilst we were in hand," he writes, "with these four Parts of the Institutes, we often having occassion to go into the City, and from thence into the Country, did in some sort envy the state of the honest Plowman, and other Mechanicks; for the one when he was at his work would merrily sing, and the Plowman whistle some self-pleasing tune, and yet their work both proceeded and succeeded. But he that takes upon him to write, doth captivate all the faculties and powers both of his mind and body, and must be only intentive to that which he collecteth, without any expression of joy and cheerfulness, whilst he is in his work." In former years the active attorney-general and the busy judge had not found the labour of his literary work tell upon him in this way.

But his work was not yet done. One more Parliament, more important than any in which he had as yet taken part, was before him; and his labours in that parliament were destined to be a fitting conclusion to his career. They were to result in adding to the statute book the first of those great constitutional documents since Magna Carta, which safeguard the liberties of the people by securing the supremacy of the law.[6]

For the Parliament of 1628 he was returned by the counties of Buckingham and Suffolk, and sat for the former.[7] "Raro,"

[1] Cro. Car. 26; Rushworth Pt. I. vol. i 201, 202—Coke took several exceptions to the sheriff's oath, but the oath was administered to him with the clauses he objected to left out.

[2] Fourth Instit. 48. [3] S.P. Dom. 1619-1623 311, cxxiii 118.

[4] See vol. vi 105-107 for the importance of this Parliament from the point of view of the development of constitutional law. [5] Below 454 n. 3.

[6] "The Petition of Right has justly been deemed by constitutional historians as second in importance only to the Great Charter itself. It circumscribed the monarchy of Henry VIII. and Elizabeth as the Great Charter circumscribed the monarchy of Henry II.," Gardiner, History of England vi 311.

[7] It was said, perhaps by a political opponent, that neither Coke nor his colleague would have been chosen if any gentleman of note had been present at the election,

he says, "electus est aliquis miles duorum comitatuum." [1] Much had happened since the last Parliament was dissolved. A forced loan had been demanded.[2] Men had been punished for refusing to contribute; and judges who declined to justify it had been dismissed.[3] Soldiers had been billeted on the people, and no redress had been forthcoming for outrages committed by them.[4] Men had been committed to prison by the command of the king without cause shown, and bail had been refused.[5] The religious opinions detested by the Commons were still openly favoured by a Court in which Buckingham still held the first place.[6] The leaders of the Commons wisely decided not to proceed at once against Buckingham, and not to press their grievances in religious matters. All their efforts were to be directed in the first place to the securing of the liberty of the subject.[7] It was because they adhered to this resolve that Coke was called upon to play so prominent a part.

Early in the session he proposed a bill which provided that, "except by the sentence of a Court, no person should be detained untried in prison for more than two months if he could find bail, or for more than three months if he could not." [8] Contrary to his former opinion, he maintained the illegality of imprisonment by the king's special command, or by the Council. When confronted with his former opinion, he freely admitted that he had been mistaken in his older views, and was now better informed.[9] Eliot both voiced the views of the House, and prophesied truly, when he said of this retractation, that "we may here thank him whom posterity will hereafter commend." [10] The resolutions of the Commons, designed to safeguard the liberty of

"for neither Ipswich had any great affection for them, nor most of the country; but there were not ten gentlemen at his election," S.P. Dom. 1628-1629 6, xcv 35—this is really incredible considering the excitement of the country at these elections, Foster, Life of Eliot i 418-429.

[1] Coll. Top. et Gen. vi 120.
[2] Gardiner, History of England vi 125.
[3] Ibid 148, 149, 155.
[4] Ibid 218, 219.
[5] Ibid 216, 217.
[6] Ibid 206-209.
[7] Foster, Life of Eliot ii 1, 2.
[8] Gardiner, History of England vi 232, 233.
[9] Ibid 243-245; Foster, op. cit. ii 26-28—"When I spoke against the loans," he said, "and this matter, I expected blows. Concerning that I did when I was a judge, I will say somewhat. I will never palliate with this house. I confess when I read Stamford then . . . I was of that opinion at the council table. But when I perceived that some members of this house were taken away and sent to prison, and when I was not far from that place myself, I went to my other books, and would not be quiet till I had satisfied myself. Stamford at first was my guide; but my guide had deceived me; therefore I swerved from it, I have now better guides. Acts of Parliament and other precedents, these are now my guides;" but it should be noted that as late as 1621 he had been of this opinion; he is reported, Proceedings and Debates 1620-1621 ii 25, 109, as holding that it is "inconvenient and may be dangerous to have in a business of state, the reason expressed in the mittimus"; on the whole matter see vol. vi c. 6.
[10] Gardiner, History of England vi 244.



the subject by preventing imprisonment without cause shown, and asserting the right of such persons to be released on bail, were sent up to the Lords; and a conference upon them was held. The Lords were willing to agree with the Commons; but they felt that some latitude should be allowed to the king to imprison without showing cause where the safety of state demanded such a course.[1] The clause which they inserted to this effect was indignantly repudiated by Coke and by the House. He wholly repudiated the notion that the king had any prerogative save such as the law allowed him. The law must bound the prerogative as it bounded all else in the state. To allow any other prerogative was wholly destructive of liberty.[2] The House came round to Wentworth's idea that a bill to safeguard this liberty was the proper course; and, on his motion, a sub-committee, consisting of the leaders of the opposition and all the lawyers in the House, was appointed to draw it up.[3] This bill entitled "An Act for the better securing of every freeman touching the propriety of his goods and liberty of his person," Coke presented to the House.[4] It recited Magna Carta and other statutes of

[1] Gardiner, History of England vi 252-260; it was proposed to say that, "As touching his majesty's royal prerogative intrinsical to his sovereignty and entrusted him from God *ad communem totius populi salutem, et non ad destructionem*, that his majesty would resolve not to use or divert the same to the prejudice of any of his loyal people in the property of their goods or liberty of their persons," ibid 260; the case for leaving the king some kind of discretionary power is best stated in a letter of the king to the Lords in the course of the debates on the Petition of Right—"We find it insisted upon that in no case whatsoever, should it ever so nearly concern matters of State or Government, neither we, nor our Privy Council, have power to commit any man without the cause be showed, whereas it often happens that, should the cause be showed, the service itself would thereby be destroyed and defeated. And the cause alleged must be such as may be determined by our Judges of our courts of Westminster in a legal and ordinary way of justice; whereas the causes may be such as those Judges have not the capacity of judicature, nor rules of law to direct and guide their judgement in cases of so transcendent a nature," ibid 276-277; this was the view taken by the lawyer who wrote the Observations on Coke's Reports; commenting on the Case of the Isle of Ely (1610) 10 Co. Rep. 141a, he says, "In case of necessity the laws allow those ways that are of most expedition and of quickest despatch; see vol. vi c. 6.

[2] "It is meant that intrinsical prerogative is not bounded by any law, or by any law qualified. We must admit this intrinsical prerogative, and all our laws are out. And this intrinsical prerogative is intrusted him by God, and then it is *jure divino*, and then no law can take it away," Gardiner, History of England vi 261, citing Parl. Hist. ii 329; cp. Coke's speech on the proposal of the Lords to insert into the Petition of Right a saving of the king's sovereign power—"I know that Prerogative is part of the law, but Sovereign power is no Parliamentary word: In my opinion it weakens *Magna Charta* and all our statutes; for they are absolute without any saving of Sovereign power: and shall we now add it, we shall weaken the foundation of law, and then the building must needs fall; take we heed what we yield unto, *Magna Charta* is such a fellow that he will have no Sovereign," Rushworth Pt. I. vol. i 562; but the fact that the king could exercise extraordinary power in the interests of justice was recognized by Coke himself as useful in Sanchar's Case (1613) 9 Co. Rep. at pp. 120b, 121a.
[3] Gardiner, History of England vi 251, 252, 264.
[4] Ibid 264; and see ibid n. 2 for the text of the Bill.

Edward I. and III.'s reigns, and went on to provide that the king had no right to billet soldiers without the householder's consent, to levy loans or taxes without the consent of Parliament, or to commit to prison. If anyone was committed to prison by the king he was to be bailed or released, and the judges were to pay no regard to the king's orders.

The strictness of the clauses as to unlawful imprisonment again caused some division of opinion;[1] and in the meantime the king, while promising to confirm the older laws, refused to consent to any encroachment on his prerogative.[2] In spite of a remonstrance of the Commons, the king held his ground. It was in the course of the debate on the answer to their remonstrance that the idea of petitioning the king was thrown out by the king's Secretary. This was taken up by Coke. Let us, he said, have a Petition of Right. To this the king must consent in a parliamentary way. We shall then get no mere verbal answer, no mere message, but a recognition of the true meaning of the law, which will place its interpretation beyond dispute.[3] At once a sub-committee was appointed to draw up this Petition of Right. But again the old difficulty as to the necessity of allowing some kind of discretionary power to the king recurred. The Lords tried in vain to insert a clause which should reserve to him some power of this kind.[4] Coke was strongly against weakening the Petition in this way.[5] As Eliot said, "No saving in this kind, with what subtlety soever worded, can be other than destructive to our work."[6] At length the Lords gave way and consented to the Petition as drawn by the Commons. The king consulted his judges as to the legal effects of the Petition,[7] and returned an evasive answer.[8]

The consideration of this answer brought on a general debate on the state of the nation. The failure of the government's policy was eloquently portrayed by Eliot, and a remonstrance was proposed. Charles ordered the House to go on with the subsidy bill; and, when it paid no attention to this message, he

[1] Gardiner, History of England vi 265.
[2] Ibid 270. [3] Ibid 273, 274.
[4] This clause ran as follows—"We present this our humble petition to your majesty, with the care not onely of preserving our own liberties, but with due regard to leave intire that Sovereign power wherewith your majesty is trusted for the protection, safety and happiness of the people," Rushworth Pt. I. vol. i 567.
[5] Above 451 n. 2.
[6] Gardiner, History of England vi 285.
[7] For the king's questions to the judges see ibid 294-296.
[8] "The king willeth that right be done according to the laws and customs of the realm; and that the statutes be put in due execution, that his subjects may have no cause to complain of any wrong or oppressions, contrary to their just rights and liberties, to the preservation whereof he holds himself in conscience as well obliged, as of his Prerogative," Rushworth Pt. I. vol. i 598.



forbade it to "lay any scandal or aspersion upon the state-government or ministers thereof." A climax was reached when Finch, the Speaker, told the House that the king had ordered him to stop any speakers "who should go about to lay an aspersion on the ministers of state." For some time the House sat silent. The conflict between loyalty to the king and indignation at this infringment of its privileges aroused emotions which no words could express. Tears stopped the speech of Coke and other members who tried to address the House. At length it was resolved to go into Committee; and the Speaker, released from the chair, retired to report what had happened to the king.[1]

It was in this committee that Coke made his last, and, under the circumstances, his boldest speech in Parliament. He pointed out that in Edward III.'s reign John of Gaunt, the king's son, and Lords Latimer and Nevil had been accused; that in Henry IV.'s reign the whole of the Council had been complained of and removed; that Parliament existed to moderate the king's prerogative, and that there were no abuses which the House could not treat of; that this Parliament had not dealt sincerely with the king, and with the country, because they had not made a true representation of the causes of their miseries; that he repented of this, and, "not knowing whether ever he should speak in this House again he would now do it freely, and there protested that the author and cause of all those miseries was the Duke of Buckingham."[2] This speech, says Alured,[3] "was entertained and answered with a cheerful acclamation of the House, as when one good hound recovers the scent, the rest come in with a full cry: so they pursued it and laid the blame where they thought the fault was."

Perhaps Charles would again have dissolved Parliament to save the Duke; but the feeling of the Lords was strongly against this course. He could not resist the pressure put on him by both Houses;[4] and he was at length driven to give his unqualified consent to the Petition in the ordinary form of words —"*droit soit fait comme est desiré.*"

Coke took little part in the remainder of the session, nor was he present in the succeeding session.[5] He felt rightly that, with the passing of the Petition of Right, his life's work was done; for in that Petition certain of the fundamental rights of Englishmen

[1] Gardiner, History of England vi 302-305; Rushworth Pt. I vol. i 613-622.
[2] Ibid 615, 621-622. [3] Ibid 622.
[4] Gardiner, History of England vi 307.
[5] Crew, Proceedings and Debates of the House of Commons in 1628 70, mentions that the Speaker was directed to send for Coke that he might advise concerning the complaints of the merchants; but there is no evidence that he obeyed the summons.

had been declared in language which admitted of but one interpretation; and this declaration was not weakened by any ambiguous saving of prerogative right or sovereign power. That it was not thus weakened was, as we have seen,[1] thought by many to be a defect, because it tied the hands of the executive too strictly in times of danger; and, as was shortly to be seen, the declaratory form in which it was drawn up concealed a logical defect, because it could be argued that it made no change in the law.[2] Both these defects are a testimony to the legal mould in which Coke's influence had led the parliamentary opposition to shape their ideas. All through his life he had held firmly to the ideas that the law must be supreme, and that the law needed only to be clearly declared to be all-sufficient. The placing on the Statute Book of a measure which embodied both these ideas was a fitting crown to his career.

The six remaining years of his life were spent at Stoke Pogis, where he died in 1634. Naturally he was an object of suspicion to the king. After the debates upon tonnage and poundage and upon religious questions, and after further attacks on Buckingham's successors, the Parliament had in 1629 been hastily dissolved, and the popular leaders imprisoned. Charles had embarked on his attempt to rule by the prerogative; and it was important to silence all objectors. In 1631 the king was frightened by the rumour that Coke was publishing a book (perhaps the Fourth Institute[3]) in which there was ground to suspect that there might be "somewhat to the prejudice of his prerogative." He commanded the lord keeper to stop the publication of this book because, "he is held too great an oracle amongst the people, and they may be misled by anything that carries such an authority as all things do that he either speaks or writes." Moreover, as rumours were afloat that his health was declining, he directed that care should be taken to seal up his study after his death.[4] This direction was obeyed in 1634.[5] Many manuscripts, including his will, were taken from his house, and many more from his chambers in the Temple. These were

[1] Above 451, 452. [2] Vol. vi 107.

[3] It is clear from the Preface to Co. Litt. that the first three Parts of the Institutes were finished in 1628, and that the Fourth part was only begun; the Preface to the Fourth Institute leads me to think that Coke had finished it later; this was probably known to Coke's friends, and some rumour of it may have reached the king.

[4] S.P. Dom. 1629-1631 490, clxxxiii 18; in 1633 the attorney-general was again examining Coke's Reports, ibid 1631-1633 251, ccxlviii 15.

[5] Ibid 1634-1635, 165, cclxxii 62; ibid 340-341, cclxxviii 10—directions for seizure and perusal of Coke's papers in the Temple; any that concern the king are to be retained; ibid 348, cclxxviii 28—direction to deliver to Coke's son any papers not concerning the king; cp. ibid 351, cclxxviii 35 for a note of the papers taken from the Temple and retained.



retained till 1641, when the House of Commons, on the motion of one of his sons, requested that they might be restored to his heir. The request was granted, and all that could be found were handed over. His will, over which he had spent much trouble in the later years of his life, was never discovered.[1]

The fears of Charles are the best evidence of Coke's reputation. It was a reputation fairly earned by the manner in which he had devoted his great mental and bodily powers to the single object of understanding, applying, explaining, systematizing, and exalting the common law. Throughout his life all his interests were subordinated to this. All his understanding, his reading, his powers of dialectic, his capacity for persuasive speech, were pressed into this service. In Council and Parliament as in the courts his thought was coloured by the concepts of the common law, and book case and record illustrated his speech. Necessarily he had the defects of these qualities. Like Bentham he was, to use Mill's expressive phrase, a one-eyed man who saw clearly.

The place which he fills in English history is due to a large extent to the character of the age in which he lived. In quieter times he would have been merely a great common lawyer with conservative prejudices.[2] But in the seventeenth century a great common lawyer was necessarily drawn into politics. What was to be the position of the common law in relation to its rivals? What was to be the position of the common law in relation to the executive government of the state? What were the doctrines of the common law as to the powers of Parliament and as to the liberties of the subject? At a time when such questions as these

[1] Coke, Detection i 354—"Upon his death-bed Sir F. Windebank . . . by an order of Council came to search for seditious and dangerous papers. By virtue whereof he took Sir Edward Coke's comment upon Littleton . . . his comment upon Magna Charta, etc., the Pleas of the Crown, and Jurisdiction of the Courts, and his 11th and 12th Reports in manuscript, and I think 51 other manuscripts, with the last will of Sir Edward wherein he had for several years been making provisions for his younger grand-children. The books and papers were kept till seven years after, when one of Sir Edward's sons in 1641 moved the House of Commons that they might be delivered to Sir Robert Coke . . . which the king was pleased to grant, and such as could be found were delivered; but Sir Edward's will was never heard of more to this day;" an earlier will is mentioned in S.P. Dom. 1623-1625 119, cliv 84-85; it is dated November 15, 1623.

[2] "For any fundamental point of the ancient common laws and customs of the realm, it is a maxim in policy, and a trial by experience, that the alteration of any of them is most dangerous; for that which hath been refined and perfected by all the wisest men in former succession of ages, and proved and approved by continual experience to be good and profitable for the commonwealth, cannot without great hazard and danger be altered or changed," 4 Co. Rep. Pref. v, vi; as Gardiner says, History of England iv 40—"Two hundred years later his name would have gone down to posterity, with Eldon's, as that of a bigoted adversary of all reform. As it was, his lot was cast in an age in which the defence of the technicalities of the law was almost equivalent to a defence of the law itself."

were being raised, a man who was both profoundly learned in the common law, and passionately convinced of its excellence, was compelled to take part in politics in order to defend its claims to supremacy. And the fact that he was thus drawn into politics caused an apparent inconsistency in his career, and some real inconsistency in his statements of the doctrines of constitutional law.[1] There seems at first sight to be little in common between the zealous attorney-general of Elizabeth's reign, and the man who framed and helped to carry the Petition of Right. But this inconsistency is to a large extent only apparent. He could be a zealous servant of the crown under the balanced Tudor monarchy, which so skilfully and diplomatically shelved fundamental questions. Under James I. he was driven to resist the attempts to substitute the supremacy of the crown for the supremacy of the common law. In the later years of James I.'s reign, and under Charles I., he was driven into alliance with the parliamentary opposition, in order to uphold as against the crown the laws which secured the rights and privileges of Parliament, the liberties of the subject, and the Protestant character of the Reformation settlement. He stood still. His outlook was always that of a statesman of the latter part of the Tudor period. It was the changing political scene which seemed to place him in constantly fresh positions, and necessarily led him to modify his views as to important doctrines of constitutional law.

The character of the man and of his age fully account for his vast influence upon the law and politics of the seventeenth century. But they do not fully account for the permanence of his influence upon the future development of English law. This permanence is due to the fact that his devotion to the common law led him to consider it to be his duty[2] to employ the scanty leisure of a busy career in the work of restating in his writings all its principal doctrines. If therefore we would understand the reasons for the permanence of his influence, if we would estimate its nature and extent, we must examine the character of thes writings.

### *Coke's Writings*

At the bar, on the bench, and in Parliament, Coke was a leader of men; and yet he found time to write a great deal more than any other lawyer of his day. For good and for evil this active professional life has left its mark upon his writings; and we must

[1] Above 427-428.

[2] "And for that I have been called to this place of judicature by his majesty's exceeding grace and favour, I hold it my duty, having observed many things concerning my profession, to publish, amongst others, certain cases that have been adjudged and resolved since his majesty's reign," 8 Co. Rep. Pref. xxxiv.



always bear it in mind if we are to give a fair judgment upon his literary achievement. No one can contend that Coke's works are literature; but if we remember the manner of man he was, and the history of his life, we may well wonder that some of them contain so many literary qualities. I shall consider here (i) Coke's literary equipment; and (ii) his published writings.

(i) *Coke's literary equipment.*

That Coke was thoroughly well read in the literature of the law, both in print and manuscript, from the time of Glanvil and Bracton to his own days, can hardly be denied by any one who has studied his writings. He was a master of the mediæval law. No one surpassed him in knowledge of the Year Books, the Register of Writs, and the mediæval Statutes. He had studied many records of the court of the Chancery, and of Parliament.[1] He was familiarly acquainted with the great books on English law—Glanvil, Bracton, Fleta and Littleton, and with the small tracts—the Novæ Narrationes, the Diversity of Courts, the old Natura Brevium. He was equally well acquainted with the modern authorities. He could cite and criticize such modern reporters as Dyer and Plowden,[2] and the abridgments of Statham, Fitzherbert, and Brooke. He had read the Doctor and Student, Staunford, Crompton, and Lambard.[3] He was intimately acquainted with the Tudor statutes. And, at the same time, his experience as barrister, attorney-general, judge, and privy councillor, gave him a familiarity with affairs, which made him able to explain and apply the law derived from these authorities in a thoroughly practical and common-sense way.[4]

His active career assisted his literary style. No one could be a successful lawyer in those days unless he were a skilful pleader; and to be a skilful pleader exactness of expression, above all things, was essential. He must also have gifts of lucid expression if, as judge or barrister, he was to prevail with a jury, and if, as attorney-general or as privy councillor, he was called on to explain

[1] He sometimes uses a record to verify a Year Book, Pinchon's Case (1612) 9 Co. Rep. at pp. 89a, 89b; or to correct a Year Book, Rigeway's Case (1594) 3 Co. Rep. 5.b—a decision as to repleading after demurrer "against the opinion of 9 H. 6 35 in an Avowry, which record had been seen, and did not warrant the report of the Book."

[2] Dowman's Case (1584) 9 Co. Rep. at p. 12b—a decision of Dyer's criticized; Thoroughgood's Case (1612) ibid at p. 137b—certain opinions expressed in a case in Dyer are criticized; cp. Bacon's account of Coke's statement as to the revision of his Reports, Spedding, Letters and Life of Bacon vi 76, to the effect that he (Coke) had found four cases in Plowden which were erroneous; for an instance see Cuppledike's Case (1602) 3 Co. Rep. at p. 6b.

[3] See his critical list in 10 Co. Rep. Pref. xiiib-xxa; cp. 2 Co. Rep. Pref. iv, v.

[4] For a good illustration of the practical way in which he can approach legislation see his explanation of the policy of the Tudors in regard to agriculture, which he inserts at the end of Tyrringham's Case (1585) 4 Co. Rep. at p. 39a.

the law to non-lawyers. It is precisely these qualities of exactness and lucidity which are characteristic of his style. Moreover, he could arrest attention by a quaint illustration or turn of expression,[1] or a fine phrase;[2] and he could tersely sum up a point of law in a maxim. The latter power indeed was sometimes dangerous; as it sometimes led him to regard these maxims, not as the short statement of a principle requiring explanation, but as the statement of a self-evident truth.[3] Though he had undoubted gifts of terse and pointed expression, his style is often discursive, and often verbose—we sometimes seem to see in it the style of the draftsman of pleadings. But it is never obscure. And, when he is fired by his theme, it even rises to eloquence. The passages, for instance, in which he sums up the manner in which the Tudor statesmen had settled the vexed question of the copyholder,[4] and in which he is expounding the excellencies of the common law and its position in the state,[5] are two good illustrations of Coke's style at its best.

And his reading was not confined solely to law books. On points of mediæval history he can cite Matthew of Paris,[6] and other chroniclers;[7] and of the historians of his own day he had read both Camden and Lambard.[8] When dealing with a matter which involved some knowledge of military matters he cites Livy, Polybius, and Vegetius.[9] He can contrast principles of the civil law with those of the common law.[10] He enlivens his text by

[1] Good Pleading is "the heartstring of the common law," Co. Litt. Pref.; the lord shall not have an action of debt for a relief, but his executors shall, "because it has now become as a flower fallen from the stock, and they have no other remedy," Co. Litt. 47b; "knowledge of the law is like a deep well out of which each man draweth according to the strength of his understanding," ibid 71a.

[2] "The gladsome light of Jurisprudence," Co. Litt. Epilogue; the laws of England are, "the golden metwand whereby all men's causes are justly and evenly measured," Fourth Instit. 240; of the copyholder he says, "though meanly descended they come of an ancient house," Copyholder § 32.

[3] As Hobbes said, Dialogue of the Common Law, Works vi 62—"He endeavours by inserting Latin sentences, both in his text and in the margin, as if they were principles of the law of reason, without any authority of ancient lawyers, or any certainty of reason in themselves, to make men believe that they are the very grounds of the law of England"; in fact, many of the Latin maxims of the common law attained their classical form in Coke's writings, e.g. there is reason to think that the maxim "ad quæstionem facti non respondent judices, ad quæstionem juris non respondent juratores," owes its final shape to Coke, Thayer, Evidence 185, 186; and this is also probably true of the maxim "actio personalis moritur cum persona," vol. iii 576.

[4] See the passage cited from Coke's Copyholder vol. iii 213 n. 3.

[5] 2 Co. Rep. Pref. viii-xii; cp. 3 Co. Rep. Pref. iii.

[6] Co. Litt. 43a; Second Instit. 15.

[7] Co. Litt. 168a.

[8] 10 Co. Rep. Pref.; Co. Litt. 168a; Fourth Instit. 63.

[9] Co. Litt. 71a.

[10] Ibid 102a, 262a, 352b, 368a; he says, 10 Co. Rep. Pref. xvii, that he has read some little part of the civil and canon laws, and that "with some good assistance and help," but disclaims any very deep knowledge.



references to Virgil,[1] Horace,[2] and Chaucer;[3] and he can illustrate a point by a citation from Tacitus,[4] Cicero,[5] or The Vulgate.[6] Nor is there any reason to suppose, as Hobbes unkindly suggested, that these citations and references did not represent his own reading of these authors.[7] It is apparent that he considered himself somewhat of an authority on etymology. But it must be admitted that of these non-professional books and non-professional branches of learning, he had no critical knowledge whatever. He accepted the information which he found with a credulity and in a manner which is as mediæval as his law. He was inclined to accept as true all the legends about Brut; and he was convinced that the ancient Britons talked Greek.[8] He imagined that the Modus Tenendi Parliamentum dated from the Conquest, and was a record of the manner in which Parliament was held under the Anglo-Saxon kings;[9] and he was firmly convinced that the Mirror of Justices gave a true account of Anglo-Saxon institutions and Anglo-Saxon law.[10] He derives the word "money" from "monendo," "because he that hath it is to be warned providently to use it";[11] while "terra dicitur a terendo quia vomere teritur."[12]

If Coke had not made these excursions into the domains of literature and history it would have perhaps been the better for the cause of English legal history. Succeeding lawyers did not separate those parts of his work which rested on a solid basis of statute, record, or Year Book, from those which rested merely upon his uncritical acceptance of historical legends. They thought that his authority upon all questions of legal history was as conclusive as his authority upon questions of mediæval or sixteenth-century law; and so they followed him rather than writers like Selden or Madox—forgetting that authority which is binding on a law court ceases to be binding in matters over which no law court has jurisdiction.

But we must now turn to the writings in which these characteristics and qualities are displayed.

[1] Fourth Instit. 289; Co. Litt. 165.

[2] Ibid 141.

[3] Second Instit. 123.

[4] Fourth Instit. 129, 244.

[5] Ibid 129; Foster's Case (1615) 11 Co. Rep. 60a.

[6] Second Instit. 53, and many other passages.

[7] Dialogue of the Common Laws, Works vi 144—"His citing of Aristotle, and of Homer, and of other books, which are commonly read by gownmen, do, in my opinion, but weaken his authority; for any man may do it by a servant."

[8] 3 Co. Rep. Pref. viii-x—"That the laws of the ancient Brittains, their contracts and other instruments, and the records and judicial proceedings of their judges were wrote and sentenced in the Greek tongue, it is plain and evident by proofs luculent and uncontroulable."

[9] 9 Co. Rep. Pref. iv; for this tract see vol. ii 424-425.

[10] 9 Co. Rep. Pref. i-v; cp. vol. ii 328.

[11] Co. Litt. 207b.

[12] Ibid 4a.

(ii) *Coke's published writings:*

In the days when all lawyers, who had progressed so far as to become benchers of their Inns, were obliged to take part, as Readers, in the education of the students in those Inns, it usually happened that their readings were their earliest literary work.[1] Coke in 1592 read both on the Statute of Uses and the Statute de finibus levatis. He was an attractive lecturer if his account of his reading on the former subject is to be believed.[2] Unfortunately it is only the latter reading which has found its way into print.[3] It contains twenty-three lectures. They consist of a short introduction, and an outline of the topics of the reading, together with the authorities on which it was based. It is not nearly as full, nor does it possess the literary merits of the parts of Bacon's more famous reading on the Statute of Uses which have come down to us. Besides this reading we need only mention two other of Coke's shorter works—a little treatise on Bail and Mainprize, and the Complete Copyholder. The former is a little tract in thirteen chapters, setting out clearly and succinctly the main principles of the law—a useful tract, one would suppose, to justices of the peace. The latter is a small book in twenty chapters and sixty-two sections. It embodies the results of the many decided cases which worked out in detail the wise policy of the Tudors with regard to the copyholders.[4] Thus it is the earliest of our modern books on this topic. This policy was one with which Coke thoroughly sympathized. Satisfaction with its results, together with the limitations of space which he imposed upon himself, have combined to give the book more literary form than that possessed by any of his larger works. It is sometimes even epigrammatic, never verbose, and always happy. To be forced to severe compression is the best tonic for very learned men who, like Coke, have a tendency to wander into obscurity in their efforts to exhaust a subject.

Coke's larger works are his Book of Entries, his Reports, and his Institutes.[5] Of each of these works I must give some description; and, in the first place, I shall speak of the Book of Entries.

[1] Vol. ii 506-507.

[2] Coll. Top. et Gen. vi 114-115—he tells us that he delivered only five lectures as the presence of the plague made it necessary to leave London; that there were present 160 "socii," and that nine of the Bench and forty of the Bar escorted him as far as Romford on his way home to Huntingfield.

[3] It is printed at the end of the ninth Ed. of Co. Litt.

[4] Vol. iii 209-213.

[5] The Book of Entries, the eleven books of Reports, and the first Institute (the only parts of the Reports and the Institutes published in his life, below 462, 466) make up the thirteen books of which his tombstone records that he was the father—"duodecim liberorum, tredecim librorum pater," Coll. Top. et Gen. vi 121.



We have seen that in this, as in the preceding period, the earliest instruction given to the student was as to the nature of writs and the forms of pleading; and that this knowledge continued to be of the first importance all through his career.[1] "Good Pleading," said Coke, "is the touchstone of the true sense of the law."[2] The growing complexity and importance of the subject led Coke to think that a book of precedents would be useful to the profession. In the preface to his book he somewhat exaggerates the scarcity of books on this topic;[3] and he recommends his collection for much the same reasons as Plowden had recommended the precedents contained in his Reports.[4] All the pleadings given were, he tells us, taken from cases which had recently come before the courts; and thus, having been sifted and approved by the judges, they could be safely followed.[5] Many of the pleadings contained in the Reports were included in the book, and others besides; and sometimes short notes and references were added to explain the forms used.[6] The book was published in 1614, so that it embodied Coke's experience both at the bar and on the bench. The chief criticism which I should be inclined to make upon it is that, in comparison with its rivals, it is somewhat old-fashioned. Rastell, for instance, included in his book published in 1564 a precedent of a declaration on a bill of exchange;[7] and at the beginning of the seventeenth century these actions were beginning to be brought in the common law courts.[8] There are no such precedents in Coke's book. That he was alive to the importance of securing for the common law this new commercial business his conflict with the court of Admiralty shows. But his book on pleading deals almost wholly with the older real actions, and the older forms and applications of the personal actions. It was probably soon superseded by the new books which gave more space to precedents adapted to the new requirements of the pleader.[9]

By far the most important of Coke's books are his Reports and his Institutes.

The first part of the Reports was published in 1600, and the next two shortly afterwards. The remaining eight parts appeared

[1] Above 379.

[2] Book of Entries, Pref.

[3] "Many have written of the former [the theoretic] part, only one of the latter, unless you will account that ancient little treatise called *Les novel Tales* or *Novæ Narrationes* to be one," ibid; we have seen that there were more books on this topic on the market when Coke wrote, above 383-385.

[4] Above 371 n. 1.

[5] Book of Entries, Pref.

[6] "Here you shall find precedents adjudged upon Demurrer, wherein lie hidden many matters of law, and excellent points of learning, which being never reported, here is for thy better light (Studious Reader) a short touch given of the reasons and causes whereupon they were adjudged," ibid.

[7] Above 384.

[8] Vol. viii 159.

[9] Above 385-386.

at short intervals between 1603 and 1615.[1] The twelfth and thirteenth parts were published after Coke's death in 1655 and 1658.[2] They were not prepared by him for the press, and are in fact simply notes of cases and of other transactions in which he had been engaged. They are valuable as historical evidence of certain of the facts of Coke's life, and as to the nature of his political views.[3] But, though they contain decisions which are still cited as leading cases in constitutional law,[4] they have never had the same authority as that possessed by the first eleven parts of the Reports, which he himself published as his considered views upon the cases therein contained.[5]

In criticizing Coke's Reports we must remember that, when he wrote, there was no agreement as to the form which a law report should take. Every law reporter had a distinct style of his own. And it is natural that this should be so; for, as we have seen, all the reports of this period were made primarily for the reporter's own use.[6] Though Coke prepared his reports for the press, he made them in the first instance for himself.[7] Therefore when we find that his reports differ in form from any other reports before or since, we can hardly accuse him of taking a liberty which he was not entitled to take.

To a certain extent Coke was guided by the nature of the cases which he was reporting.[8] Sometimes, for instance, in the

[1] Above 359; cp. Wallace, The Reporters 166-167.

[2] Above 359, 369.

[3] Above 430-431, 432-433.

[4] Prohibitions del Roy (1608) 12 Co. Rep. 63; the Case of Proclamations (1611) ibid 74; cp. also the Case of Commissions of Enquiry (1608) ibid 31.

[5] In the preface to Bulstrode's Reports, Bulstrode explains that, when the print of 12 Co. Rep. was brought to him, he expressed the opinion that the reports were Coke's, but said that it contained "so many gross mistakes, misprintings, and imperfections that I told the party that brought it that it was not fit for the public view with so many defects in it"; in the King v. Atkins (1682) 3 Mod. at p. 13 a case reported 12 Co. Rep. 120, 121 is referred to as being "in those reports that go by the name of Lord Coke's"; in M'Pherson v. Daniels (1829) 10 B. and C. at p. 275 Parke J. said—"the 12 Rep. is not a book of any great authority . . . being not only posthumous, but apparently nothing more than a collection from papers neither digested nor intended for the press by the writer. . . . And Holroyd J. in Lewis v. Walter (4 B. and Ald. 614) gives an opinion unfavourable to its accuracy." The political views expressed in the cases there reported have no doubt helped to depress the authority of these reports; Jenkins, Eight Centuries of Reports, Pref. v, complains of passages in Coke's unpublished writings, "by which he seems to bridle the sovereign and give reins to the people"; but it is probable that opinions of an opposite character, such as those contained in the Case of Non Obstante (pp. 18, 19) and in the notes as to Customs, Subsidies and Impositions (p. 33) helped (though undeservedly) to lower the character of the book in later times, cf. Hargrave's remarks 2 S.T. 381; and Serjeant Hill's remarks cited by Parke J. 10 B. and C. at p. 275; lawyers after the Revolution had no difficulty in rejecting these cases, and regarding them as a reflection upon the reporter, while accepting cases, such as the Case of Proclamations, which contained opinions agreeable to the then established constitutional doctrines.

[6] Above 364.

[7] Above 364 n. 3.

[8] "In these reports I have (of purpose) not observed one method, to the end that in some other edition (if God so please) I may follow the form that the learned shall allow of," 1 Co. Rep. Pref.



cases which he reports on points of practice, he makes the case a mere text for a summary of the law on the subject. He collects all the earlier cases and the statutes, and states his view of the law in the form of rules.[1] Sometimes he collects a number of cases bearing upon a particular topic, e.g. on copyhold,[2] usury,[3] by-laws,[4] executions,[5] slander,[6] and appeals and indictments;[7] and then he gives a summary account of the decisions in each case and the reasons for them. When the case deals with an important principle of law, he often gives the pleadings at length, a summary of the arguments on both sides, and the decision together with the reasons for it.[8] In these cases he goes at length into all the authorities ancient and modern, explains, distinguishes, and, when possible, reconciles conflicting decisions and dicta. To the pleadings he attached great importance; and when the pleadings are set out he sometimes shortens the argument.[9] To his mind the ideal report was a summary account of the effect of all that was said on both sides, "beginning with the objections and concluding with the judgment of the court."[10] But he admits that, owing to the wishes of the profession, he has sometimes departed from this rule and given an account of "the effect of all that was objected or resolved," whether relevant to the decision or not.[11] Like the older reporters, he occasionally diverges to comment upon the conduct of a case,[12] to note the character of a judge,[13]

[1] A good illustration is Arthur Blackamore's Case (1611) 8 Co. Rep. 156a, as to amendments of process; cp. Beecher's Case (1609) 8 Co. Rep. 58a—as to amercements; Hensloe's Case (1600) 9 Co. Rep. 36b—as to executors and administrators; the Earl of Shrewsbury's Case (1611) 9 Co. Rep. 46b—as to the nature of various offices.

[2] 4 Co. Rep. 21a-32a.

[3] 5 Co. Rep. 69a, 70b.

[4] Ibid 62b-64a.

[5] Ibid 88a-91a.

[6] 4 Co. Rep. 12b-21a.

[7] Ibid 39b-48a.

[8] E.g. Shelley's Case (1579-1581) 1 Co. Rep. 88b; Chudleigh's Case (1589-1595) 1 Co. Rep. 113b; Calvin's Case (1609) 1 Co. Rep. 1a; but sometimes he omits the arguments to shorten the report, e.g. in Lord Cromwell's Case (1601) 2 Co. Rep. at p. 70b.

[9] The Prince's Case (1606) 8 Co. Rep. at p. 15a. In Mary Portington's Case (1614) 10 Co. Rep. 37a he says that he has shortened the report because he has before reported other cases to the same effect.

[10] "Relating the effect of all that was said of the one side by itself, and so likewise of the other, beginning ever with the objections and concluding with the resolution and judgment of the court, which I hold to be the best order of relation," 10 Co Rep. Pref. xii.

[11] "But seeing my desire is and ever hath been that the counsel learned and consequently the parties might receive satisfaction, . . . I have in the cases of greatest consequences made the larger report, comprehending the effect of all that was objected and resolved," ibid xii, xiii.

[12] In Brittridge's Case (1602) 4 Co. Rep. at p. 19b it is said "that if the plaintiff's counsel had disclosed the truth of the case in the declaration, the said words would have well maintained the action."

[13] See e.g. Butler and Baker's Case (1591) 3 Co. Rep. at p. 26a for notices of Wray C.J. and Manwood C.B.; and Dowman's Case (1586) 9 Co. Rep. 15a for a notice of Dyer.

to state his views as to public policy,[1] or to give advice to lawyers and laymen.[2]

Thus it is clear that Coke in some cases deliberately set himself to give an account of the law as it stood in his day, and simply used the case which he is reporting as a peg on which to hang his disquisition; while in others he intends only to give the effect of the arguments actually used during its hearing.[3] But it is extremely probable that, even in the latter class of cases, his enthusiasm for sound doctrine, and his great learning, led him to improve upon the arguments used, by explaining more clearly the grounds upon which they rested, and by showing how they were consistent with the numerous dicta on the subject which could be found in the Year Books.[4] Occasionally, we cannot doubt, he added and explained authorities suggested to him by his own reading—Bacon once said that in his Reports there was too much "de proprio;"[5] and the writer of the Observations, attributed to Lord Ellesmere, is even more severe.[6]

The cases reported form a corpus of the common law, both criminal and civil, as it existed in the sixteenth and early seventeenth centuries. All parts of the law, old and new, are reviewed. The older learning where applicable is restated; and the manner in which it has been modified by the numerous and important statutes of this period is explained.[7] Thus in *Caudrey's Case* we get Coke's view of the legal effects of the Reformation legislation;[8] and in other cases the statutes which introduced new branches of law, such as those relating to bankruptcy,[9] fraudulent conveyances,[10]

[1] Tyrringham's Case (1584) 4 Co. Rep. at p. 39a—as to the need for protecting agriculture.

[2] E.g. Butler and Baker's Case, at p. 36b—advice as to the making and revocation of wills; Edward Seymour's Case (1613) 10 Co. Rep. at p. 98a—advice to pleaders; Robert Pilfold's Case (1613) 10 Co. Rep. at p. 117b—advice not to put too much trust in Abridgments "which are good to serve as tables to find the cases in, and not to ground any opinion upon."

[3] He says in the Preface to Co. Litt.—"In the eleven books of our reports we have related the opinions and judgments of others; but herein we have set down our own."

[4] Cp. Thayer, Evidence 186-187 n.

[5] "Great judges are unfit persons to be reporters, for they have either too little leisure or too much authority . . . that of my lord Dier is but a kind of note book, and those of my lord Coke's hold too much *de proprio*," Spedding, Letters and Life of Bacon v 86.

[6] "Scattering or sowing his own conceits almost in every case, by taking occasion (though not offered) to range and expatiate upon bye matters," Observations on Coke's Reports 2; "he hath expatiated into new fields, and stuffed his volumes with grains of another kind, as if they were rather commonplaces for stores of different matters than true observations of the reasons of the cases then in judgment," ibid 19-20; for striking illustrations see above 430 nn. 2 and 3.

[7] Good illustrations are, Butler and Baker's Case (1591) 3 Co. Rep. 25a; the Case of Fines (1602) 3 Co. Rep. 84a; the Case of Magdalen College, Cambridge (1616) 11 Co. Rep. 66b.

[8] (1591) 5 Co. Rep. 1. [9] The Case of Bankrupts (1584) 2 Co. Rep. 25a.

[10] Twynne's Case (1602) 3 Co. Rep. 80b.



and usury,[1] are applied and interpreted. The new developments of the common law—such as the beginnings of the struggle against the creation of perpetuities,[2] the development of assumpsit,[3] and the new practice of hearing actions on contracts made abroad[4]—are noted, justified, and explained. And the cases reported are by no means confined to those heard in the common law courts. Numerous cases heard by the court of Wards,[5] several heard by the court of Star Chamber,[6] and one or two heard in the Chancery are reported.[7] One case even gives us the advice given by the judges to the House of Lords as to a pending bill.[8] The fact that the common law could appeal to some of these precedents was very useful to it when, as a result of the Great Rebellion, the common law courts got all and more than all the jurisdiction which Coke had claimed for them.

The Reports illustrate the manner in which the modern had been developed from the mediæval common law by the lawyers and the legislature. They show that the gradual nature of this development had made this modern common law a complex mass of "almost infinite particulars." How could it be taught to the student of law? The older methods of oral Readings and moot cases were well enough so far as they went; and they can never be wholly discarded in any system of legal education. But now that the legal system had grown so complex, they were not sufficient by themselves, because they could not cover the ground. They must be supplemented by "timely and orderly reading," by "recordation" of the things read, and by the making of abridgments.[9] But what was the student to read? Such books as Littleton, the Doctor and Student, or Perkins were quite inadequate as an introduction to the law of the sixteenth century. Coke set himself the task of supplying this introduction by his four books of Institutes;[10] and on them he based a wholly new

[1] Cases of Usury 5 Co. Rep. 69a-70a.

[2] Chudleigh's Case (1589-1595) 1 Co. Rep. 180a; Sir Anthony Mildmay's Case (1606) 6 Co. Rep. 40a; Mary Portington's Case (1614) 10 Co. Rep. 35b.

[3] Slade's Case (1602) 4 Co. Rep. 92b.

[4] Dowdale's Case (1606) 6 Co. Rep. 46b. [5] E.g. 8 Co. Rep. 163b-173b.

[6] E.g. Twynne's Case (1602) 3 Co. Rep. 80b; De Libellis Famosis (1605) 5 Co. Rep. 125a.

[7] Buckhurst v. Fenner (1598) 1 Co. Rep. 1.

[8] The Case of Ecclesiastical Persons (1602) 5 Co. Rep. 14a.

[9] "In troth, reading, hearing, conference, meditation, and recordation, are necessary . . . to the knowledge of the common law, because it consisteth upon so many, and almost infinite particulars: but an orderly observation in writing is most requisite of them all; for reading without hearing is dark and irksome, and hearing without reading is slippery and uncertain, neither of them truly yield seasonable fruit without conference, nor both of them with conference, without meditation and recordation, nor all of them together without due and orderly observation," 1 Co. Rep. Pref.

[10] "I have termed them Institutes because my desire is, they should institute and instruct the studious, and guide him in a ready way to the knowledge of the National

scheme of legal study. He advises the student to read and digest these works, while he is attending moots and readings and the courts.[1] He should then tackle the reports—reading first the more recent, and then the older cases and the older textbooks.[2] Coke thus both sketched in outline the modern methods of legal study, which the growing complexity of the law and the printed book had rendered necessary and possible, and actually introduced them, by writing the first of our English textbooks upon the modern common law.

The Institutes are in four books. The first contains Littleton's text with an elaborate commentary; the second contains a commentary upon Magna Carta, and many other mediæval statutes together with certain modern statutes; the third contains the criminal law; and the fourth an account of the various courts which had jurisdiction in the English state. The first Institute was published in 1628. The second and third were finished at the same time, but were not published till 1641; and the fourth, which was finished in the later years of Coke's life, was also published in 1641. Of all parts of the Institutes there have been very many editions; and the first Institute has been several times abridged.[3]

The First Institute—Coke upon Littleton—is very different in character to all the others. It is very much more full and more elaborate, and was, as we have seen, the only one of the Institutes published in Coke's lifetime. Evidently it was a book upon which Coke had been engaged all his life.[4] Littleton was the first book which a student read.[5] Coke upon Littleton was meant to be Littleton brought up to date, bearing somewhat the same relation to the original, as Justinian's Institutes bear to those

laws of England," Co. Litt. Pref. Perhaps it was Camden who suggested the title to him, as he quotes him, 10 Co. Rep. Pref. xvii, xviii, as saying that Littleton's Tenures were no less useful to the students of the common law than Justinian's Institutes to the civilians.

[1] Co. Litt. Pref., cited above 465 n. 9.

[2] "After our student is enabled and armed to set on our Year Books . . . let him read first the latter reports, for two causes; first for that the most part the latter judgments and resolutions are the surest. . . . Secondly for that the latter are more facile and easier to be understood than the more ancient; but after the reading of them, then to read these others before mentioned, and all the ancient authors that have written of our law; for I would wish our student to be a compleat lawyer," Co. Litt. 249b.

[3] Ibid Pref.; for a good account of the dates of publication of the various editions see Dict. Nat. Biog.

[4] Throughout the Reports we get passages in which Coke eulogises Littleton (e.g. 2 Co. Rep. 67a; 3 Co. Rep. 63b); in the Pref. to 10 Co. Rep. xv-xviii occurs his denunciation of Hotman for having ventured to speak disrespectfully of him, and his eulogy of Littleton's book—"And for Littleton's Tenures, I affirm and will maintain it against all opposites whatsoever, that it is a work of absolute perfection in its kind, and as free from error as any book that I have known to be written of any human learning."

[5] For Littleton and his book see vol. ii 571-575.



of Gaius. But in fact it is a great deal more than this. The commentary itself is of extraordinary verbal minuteness—extending even to the use which Littleton makes of an "etc.";[1] and of an equal remarkable fulness. Every word, every doctrine, every legal institution, is explained. When necessary its history is given, and changes and developments which have occurred since Littleton wrote are noted. All Coke's reading in the older text books, in the Year Books, abridgments, and records, in modern legal writers, in general literature, and all his experience as counsel and as judge, are pressed into this service.[2] The result is that discussions of the most abstruse legal doctrines are found side by side with the most elementary pieces of information; and the student is instructed not only in the land law but also in many other branches of the law. Thus there is information as to the later developments of detinue and conversion,[3] as to the law of executors,[4] as to negligence[5] and duress,[6] as to pleading and procedure,[7] as to mercantile law,[8] as to actions in England on transactions abroad,[9] as to corporations,[10] as to allegiance,[11] as to estoppel,[12] as to felony,[13] as to maintenance and champerty,[14] and many other topics. In fact, all branches of the law which are not to be found in the other three books of his Institutes, and a good many that are, will be found more or less fully treated in the first Institute. It is a legal encyclopædia arranged on no plan,[15] except that suggested by the words and sentences of Littleton.

It is clear that such a book was very ill-suited to be a student's textbook. Roger North expressed the opinion that it ought not to be read by students, because it is "much more obscure than the bare text without it";[16] and there is much to be said for this view. But though it cannot be said that it ever was a good students' book, it is perhaps possible to explain why it was that

[1] Co. Litt. 17a, 17b—"there is nothing in our author but is worthy of observation. Here is the first 'etc.' and there is no 'etc.' in all his three books . . . but it is for two purposes. First it doth imply some other necessary matter. Secondly that the student may . . . inquire what authorities there be in the law that treat of the matter." Coke then enumerates 119 sections in which the "etc." occurs.

[2] Thus ibid 49b, 221b, Coke refers to cases which he had heard and observed; Butler truly says that this commentary "is an immense repository of everything that is most interesting or useful in the legal learning of ancient times," Reminiscences of Charles Butler i 118.

[3] 1 Co. Litt. 57a, 286b. [4] Ibid 89b. [5] Ibid 246a.
[6] Ibid 253b. [7] Ibid 128b, 303a-304b. [8] Ibid 172a, 182a.
[9] Ibid 261b. [10] Ibid 250a. [11] Ibid 68b.
[12] Ibid 352a-352b. [13] Ibid 391a. [14] Ibid 368b.

[15] Coke did not think much of elaborate schemes of arrangement; he tells us in the Preface to the Book of Entries that in his opinion, "every man's own method and observation in reading is ever the best and readiest of all others for himself"—he certainly acted on this maxim.

[16] Lives of the Norths i 17; and Blackstone, Comm. i 73, was of much the same opinion.

Coke could recommend it as useful for this purpose. It seems to me that there are two sets of reasons which may afford a partial explanation. In the first place, he did not intend the student to read the whole commentary at once. He meant him to master Littleton's text, and then to assimilate the commentary by degrees;[1] and he no doubt considered that the reading of the text and commentary would be supplemented by the educational system of the Inns of Court, which, though on the decline, was still a living system.[2] In the second place, the grouping of a large number of miscellaneous legal topics round the land law followed the traditional historic order of the common law. Just as in Roman law many topics belonging to the general law of contract are grouped round the stipulatio, because it was the most general form of contract known to Roman law, so in English law, from the days of Bracton downwards, many various topics had been grouped round the land law, because it was the most highly developed branch of the common law.[3] We see this characteristic in Littleton's own book;[4] and it is of course much more marked in Coke's commentary, because, between the times when Littleton and Coke wrote, these other branches of the law were being rapidly developed. This rapid development was fast making this grouping of topics obsolete. The law of contract and the law of personal property were becoming independent branches of the law—as important as the land law itself. But it was hardly to be expected that a man like Coke, who was saturated with mediæval law, whose outlook both as judge and politician had ever been directed to the past, should appreciate these new developments. That was a point of view which came more naturally to a man like Bacon whose outlook was always towards the future.

The Second Institute deals mainly with public law, and with the additions which statutes had made to that common law which had been more or less described in the preceding book. Altogether some thirty-nine statutes are commented on, of which twenty-six belong to the mediæval period. Round the commentary on Magna Carta,[5] the Confirmatio Cartarum,[6] the De Tallagio non concedendo,[7] and the Articuli super Cartas,[8] is grouped much learning on those constitutional doctrines which Coke spent his

[1] Co. Litt. Pref.—"Mine advice to the student is, that before he read any part of our commentaries upon any section, that he first read again and again our author himself in that section, and do his best endeavours, first of himself, and then by conference with others (which is the life of study) to understand it, and then to read our Commentary thereupon, and no more at any one time than he is able with delight to bear away."

[2] Vol. ii 506-508; vol. iv 263-270; vol. vi 481-486.
[3] Vol. ii 260.
[4] Ibid 590.
[5] Second Instit. 1 seqq.
[6] Ibid 525 seqq.
[7] Ibid 532 seqq.
[8] Ibid 537 seqq.



later years in asserting; and round the commentary on Circumspecte Agatis,[1] De Asportatis Religiosorum,[2] and Articuli Cleri,[3] is to be found the learning as to the relations of the ecclesiastical to the common law. Throughout the commentaries on these statutes we hear echoes of the great political controversies of the day—the questions of impositions,[4] of monopolies,[5] of prohibitions,[6] of the right to release on bail,[7] of the right of the king to stay proceedings in an action.[8] His comments on the other mediæval statutes contain disquisitions on many various branches of mediæval law, which either had not been noticed, or which seemed to demand fuller treatment than they had received in the comment on Littleton. Thus we get comments on the Statutes of Merton,[9] Marlborough,[10] the two statutes of Westminster,[11] the modus levandi fines and the de finibus levatis,[12] on certain statutes from Richard II. and Henry VII.'s reigns relating to the export of the precious metals,[13] and on a statute of Henry V.'s reign relating to Additions, i.e. descriptions of defendants in legal proceedings.[14] Certain sixteenth century statutes, which introduced new branches of the law, are noted. They comprise the statute of enrolments,[15] certain statutes of Henry VIII.'s reign relating to procedure, to the repair of bridges, and to printers;[16] and certain statutes of Elizabeth's and James I.'s reigns relating to hospitals, houses of correction, rogues, and the building of cottages.[17] As usual the commentaries are both discursive and learned. In the case of the more modern statutes they are historically very valuable, because they often give us the contemporary view of the reasons for passing them, and first hand information of the results of their working.[18]

The first two parts of the Institutes had dealt, as Coke says,[19] mainly with common pleas. The Third Institute deals with criminal law. Beginning with high treason, it expounds in a hundred chapters all kinds of offences new and old. It then deals with judgments and execution, and other consequences of a conviction for treason or felony; and ends with some account of pardons and restitutions. In this part of his subject Coke had had predecessors. Staunford had written on the pleas of the crown;[20] and the books on the justices of the peace had dealt

[1] Second Instit. 487 seqq.
[2] Ibid 580 seqq.
[3] Ibid 599 seqq.
[4] Ibid 58-63.
[5] Ibid 47, 63.
[6] Ibid 601 seqq.
[7] Ibid 185 seqq.
[8] Ibid 187.
[9] Ibid 79.
[10] Ibid 101.
[11] Ibid 156, 331.
[12] Ibid 510, 521.
[13] Ibid 741.
[14] Ibid 665.
[15] Ibid 671; vol. iv 460.
[16] Second Instit. 677, 681, 697, 743.
[17] Ibid 707, 720, 726, 728, 736.
[18] Vol. iv 356, 357, 366, 396.
[19] Third Instit. Pref.
[20] Above 392.

with the criminal side of their jurisdiction.[1] But Coke's book was more elaborate than any of these; and, as he himself points out, his career as law officer and judge enabled him to give a good deal of new information on the subject of the important developments which had taken place in the law of treason, as well as in other parts of the law during this period.[2] Here, as in the Second Institute, he has a good deal to tell us of the statutes of his own day. Of these the most important were those relating to monopolists,[3] dispensers with penal statutes,[4] and bankrupts.[5]

The Fourth Institute deals with the jurisdiction of courts; and here again Coke had predecessors in Lambard[6] and Crompton.[7] But here again his work is a great deal more elaborate than that of his predecessors. Much had happened since those books were written. Coke himself and James I. had put forward their claims to settle conflicts of jurisdiction between these courts; and Coke had been driven from the bench.[8] He would not have regarded his work as complete unless he had left on record some considered account of his views as to the proper relations of those many courts which bore rule in the English state.[9] Beginning with the High Court of Parliament, he travels through the whole mass of councils and courts, central and local, which administered justice in the king's name. He includes the courts of the counties Palatine and other franchise jurisdictions great and small, the courts of the city of London and other cities, the ecclesiastical courts, the courts of the kingdoms of Scotland and Ireland, of the Channel Isles, the Isle of Man, and the Isle of Wight; and in dealing with "the conservator of truces" he takes occasion to give such information as he had acquired of cases turning upon the new international law.[10] Throughout the book the supremacy of the common law courts is maintained; and, in dealing with the Admiralty and the Chancery, there is no doubt that it is only maintained by a considerable straining of the older authorities. On the other

[1] Vol. iv 115-119.

[2] "When we consider how many Acts of Parliament (published in print) that have made new treasons and other capital offences, are either repealed by general or express words or expired: how many indictments, attainders of treasons, felonies, and other crimes, which are not warrantable by law at this day: and how few book cases there have been published of treasons . . . and those very slenderly reported: we in respect of the places which we have holden, and of our own observation, and by often conferences with the sages of the law in former times concerning criminal causes . . . have thought good to publish this third part of the Institutes," Third Instit. Pref.

[3] Third Instit. c. 85; vol. iv 345-353.

[4] Third Instit. c. 86; vol. iv 358-359.

[5] Third Instit. c. 91; above 135-136, 139; vol. viii 236-240.

[6] Vol. iv 117-119.

[7] Ibid 212.

[8] Above 440.

[9] Fourth Instit. Pref.

[10] Fourth Instit. c. xxvi.



hand, he was not prepared to deny, as the Parliamentary lawyers and statesmen then and afterwards denied, the legality of the jurisdiction of the Star Chamber. He defended both its legality and its utility.[1] We cannot doubt that he honestly thought that he had given a true description of the sphere of the jurisdiction of the courts which competed with the common law. But, in reality, he simply repeats the views which he had expressed when on the bench—even in the case of the Chancery he seems to revert to his old position.[2] That these views would give offence he did not doubt;[3] and almost his last words were a solemn warning to the judges to deliver their opinions justly according to law, careless whether or no they offended great men or favourites.[4]

It is easy to see why Coke did not care to publish the last three parts of the Institutes in his life-time. The First Institute dealt with branches of the law very remote from any of the constitutional controversies of the day. But a large number of the topics treated of in the other three books touched them at many points. When the Second and Third Institutes were finished in 1628 Coke's active career was over;[5] and when the Fourth Institute was finished, Parliament had been dissolved and the country was being governed by the Prerogative.[6] We cannot blame Coke for not wishing to shorten his few remaining years by a close imprisonment in the Tower. He had recorded his opinions. Their publication could well wait till a more favourable season.

When they were published in 1641, it was the hour of the victory of the common law and the Parliament. Men did not stop to consider the accuracy or the validity of the arguments upon which Coke based his claim that the common law and Parliament were supreme in the state, they simply accepted them, and made his writings the basis, not only of our modern constitutional law, but also of the whole of that large part of our

[1] Vol. i 507-508, 513; Fourth Instit. 62-63.

[2] Third Instit. 123-125; cp. Fourth Instit. 82-84; it is alleged that in this case the publisher included old notes and torn papers written before James I.'s decision, Vindication of the Jurisdiction of the Court of Chancery, 1 Ch. Rep. 2-3.

[3] Ibid, Epilogue—"Throughout this treatise we have dealt clearly and plainly concerning some pretended courts which either are no courts warrantable by law . . . or which without warrant have incroached more jurisdiction than they ought . . . Wherein if any of our honourable friends shall take offence our apology shall be, *Amicus Plato, Amicus Socrates, sed magis amica Veritas.*"

[4] "And you honourable and reverend judges and justices, that do or shall sit in the high tribunals and courts or seats of justice . . . fear not to do right to all, and to deliver your opinions justly according to the laws . . . And if you shall sincerely execute justice be assured . . . that though thereby you may offend great men and favourites, yet you shall have the favourable kindness of the Almighty, and be His favourites," ibid.

[5] Above 453-454.

[6] Above 454.

modern English law which is comprised under the general term "common law."[1] It is not surprising therefore that, from that time, and almost down to our own days, there have been many lawyers who would hardly admit of the existence of any serious shortcomings in Coke's work.[2] But during the last century there has been a reaction. Coke has been attacked on opposite grounds by two very different schools of lawyers. In the first place, he has been attacked by the historical school on the ground that he has sometimes carelessly, and sometimes it is even said intentionally,[3] misrepresented historical facts. In the second place, he has been attacked by lawyers of the school of Austin and Bentham on the ground that both the matter and the form of his writings are obscure, illogical, and ill-arranged. Let us look at these two classes of criticism and see to what extent they are justified.

(*a*) *The exceptions taken by the historians.*

Time has its revenges. Coke in his lifetime was at pains to advise and correct historians if they ventured into the domain of law;[4] and now the historians have turned upon Coke, and pointed out that his history is often inaccurate, and that his law is not the true mediæval law which he represented it to be. It must be admitted that there is a large amount of substantial truth in these criticisms. Coke was always the lawyer, always the advocate, and in the latter part of his life a keen politician. The lawyer, the advocate, and the politician must needs make excursions into the domain of the historian for their own special purposes. But history so produced will generally be, as history, worthless. If we remember that Coke's excursions into the domain of history were all made with a purpose; and that, in addition, he had no conception of history for its own sake, and no power of criticizing the historical sources which he used, we shall not be surprised that, as compared with the work of true historians, like Selden or Bacon, his historical work is almost

[1] See the Preface to Prynne's Animadversions.

[2] Thus Butler said, Reminiscences i 65, that "he has never met with a person thoroughly conversant in the law of real property who did not think with him—that *he* is the best lawyer, and will succeed best in his profession, who best understands Coke upon Littleton."

[3] That his misrepresentations were intentional I can hardly believe in the face of his known honesty and the high standard which he set before himself, see e.g. 9 Co. Rep. Pref. xivb, xv; but, as we shall see, the zeal with which he took up any cause that he was advocating at the moment, caused him to put such extraordinary constructions on his authorities that it is easy to think that he was intentionally misrepresenting them.

[4] "To grave and learned writers of Histories, my advice is, that they meddle not with any point or secret of any art or science, especially with the laws of this realm, before they confer with some learned in that Profession," 3 Co. Rep. Pref. xiii.



contemptible. If we glance at the various purposes for which Coke was obliged to trespass upon the domain of the historian, we shall be the better able to understand why, in this historical age, Coke's reputation has fallen to perhaps an unduly low ebb.

As a lawyer Coke was obliged to make a large use of history in order to explain his law. The continuity of the common law must make every sound common lawyer something of an historian, even in these days of active legislatures and tyrannous majorities; and much more was this the case in Coke's day, when the law was regarded, not as the will of the strongest, but as a set of just principles to be declared by the lawyers from their books of authority and the records of the courts. At all times, moreover, our system of case law has tended to make lawyers exaggerate the amount of continuity which there is in the development of legal doctrine. Coke drew his precedents from very old sources—the older the source, he thought, the purer the law.[1] He naturally represented the law of his own day as the logical outcome of the law laid down in these older sources. The newer decisions had not changed the law—they had merely developed or explained the truth to be found concealed in the oldest authorities. This way of reasoning, which is found not only in Coke but also in the writings of many later generations of lawyers, has tended to mislead historians who are not lawyers. At the same time the present state of our knowledge of legal history has led historians who are lawyers to join in condemning Coke. We know more about the legal doctrines of the twelfth and thirteenth centuries than about the legal doctrines of the fifteenth and sixteenth centuries. We see a doctrine in Bracton or in the earlier Year Books. We see it in a somewhat different form in Coke; and we are apt to conclude that Coke has been perverting his sources.

Let us take an illustration. Pike has pointed out[2] that when Coke, commenting on Littleton, states that an advowson lies in grant *but not in livery*, he is introducing a negative statement for which there is no warrant in Littleton. But though Coke has thus given a new turn to Littleton's words, he did not do so without authority. In 1490[3] Brian and Vavisor agreed that since an advowson passed by grant, it could not pass by livery. Coke was not writing legal history. He was only using legal

[1] 2 Co. Rep. Pref. xii, xiii; 4 Co. Rep. Pref. v-vi, cited above 455 n. 2.

[2] L.Q.R. v. 36; vol. iii 98-99.

[3] Y.B. 5 Hy. VII. Pasch. pl. 5 p. 3, *Brian* says—"N'est ascum doubte mes a cest jour advowson per grant passe bien . . . donques si ce passe per grant, comment poit cest passer per livery? Ceo ne poit estre: car rent passe per grant, donc ce ne poit passer per livery, car *oppositum in opposito*: et issint il dit nul question que advowson ne poit passer per livery. *Quod Vavisor concessit: et Townsend non negavit.*"

history to explain the law of his own day; and I think it probable that some of his statements, which seem at variance with the older authorities, are based upon more recent authorities which, as a lawyer stating modern law, he was bound to follow.[1] A judge who at the present day followed seventeenth century rather than nineteenth century decisions, would find his judgments very frequently reversed. I do not, of course, mean to say that all Coke's historical statements can be justified in this way—many of them are obviously wrong,[2] and some of them are confused.[3] How many can be so justified I cannot pretend to say; for that would involve a knowledge of the Year Book cases and sixteenth century reports to which I cannot pretend. But very probably some of his errors may be thus explained; and clearly for errors of this kind he cannot be censured. Nor can he, I think, be censured because his conservative prejudices and his profound acquaintance with the mediæval sources have sometimes laid him open to the opposite criticism, that he lays down as living law rules which were, if not obsolete, tending to become obsolete.[4] But these pleas cannot be urged in defence of the errors into which he fell, either from his habits of indiscreet advocacy or from his political bias.

A very cursory acquaintance with Coke's writings will show us that he approached both law and history with the mind of a strenuous advocate. All through his life he never ceased to be an advocate of legal doctrines or political causes. Whether he is reporting a case, or arguing for the supremacy of the common law in the state, or upholding the rights and privileges of Parliament, he does it with all his strength; and the result is that he talks and writes himself into a decided view on the subject. I very much doubt whether in all Coke's writings a passage could be found in which he admits that he has left any uncertainty in the law. There are many passages in which he states he has reconciled all doubts and all conflicting cases; and no doubt he honestly thought that he had done so. He had taken a view; he had supported it with all his learning; and he had no manner of doubt that it was the only possible view. Now this defect of Coke's mind is the cause of two very grave shortcomings in his writings.

In the first place, the many causes which he advocated in the course of his long life were not always consistent with one another. Thus the dicta in *Bonham's Case*, on the power of the common law to override Acts of Parliament, are not very consistent with the views which he elsewhere expresses about the supremacy of Parliament.[1] Some of his dicta in the *Case of Non Obstante*, as to an inseparable prerogative belonging to the crown, which no Act of Parliament can take away, are certainly not consistent with his more considered statements that the prerogative is subject to the law.[2] His work therefore is disfigured by inconsistent statements; and it is for this reason that it is difficult, as Maitland has pointed out, to pin him down to any particular theory.[3]

In the second place, this mental defect tended to make him very uncritical in the use of his authorities, and even led him to misrepresent their effect. He always seems to be arguing a case; and everything strong or weak that may affect the decision must be urged. To such a man the definite statements made in the Mirror of Justices strongly appealed. They confirmed all his preconceived ideas of the antiquity of the common law. They told him that, behind the meagre statements of the Anglo-Saxon codes and early Norman custumals (such as the Leges Wilhelmi), there existed both the Parliament and the common law with which he was familiar.[4] They proved, to his mind, the theory, which he wished to believe, that the common law owed little or nothing to the Conqueror and his successors.[5] And this readiness to accept anything in support of the view which he is defending, makes it easy for him to misrepresent his authorities, by reading, into them the sense which supports the conclusion which he wishes to draw. We have seen that he twice repeats a statement that one of the counts of an indictment of Wolsey contained an accusation that he had attempted to subvert the common law

[1] As we have seen he recommends the student to read the more recent cases first, above 466 n. 2.

[2] See e.g. his statement in the Case of Abbot of Strata Mercella (1592) 9 Co. Rep. 32b that the ordeal was taken away by Parliament—as to this see vol. i 311; in Mary Portington's Case (1614) 10 Co. Rep. 38a Serjeant Hill has corrected a deduction drawn from Fitz., Ab. *Brief* pl. 324 as to the effect on the estate of a tenant in tail of a recovery in value—as to this see vol. iii 118-119.

[3] See e.g. in Peytoe's Case (1612) 9 Co. Rep. 80a—a very confused account of the writs Quare ejecit infra terminum and ejectio firmæ; for these writs see vol. iii 214.

[4] For Hale's criticisms (2 P.C. 109, 110) on Coke's views as to the powers of the justices of the peace to arrest suspected persons see vol. i 294-295: so too in Semayne's Case (1605) 5 Co. Rep. 91b he says that, "although a man kills another in his defence, or kills one per infortunium, without any intent, yet it is felony"; as to this see vol. iii 312—obviously Coke treated the old principle as the rule, and the later cases as establishing exceptions to it, though, when he wrote, the old rule was practically obsolete.

[1] Vol. iv 187 n. 2; cp. vol. ii 442. [2] Vol. iv 205-206; above 430-431, 451.

[3] Maitland, Constitutional History 300.

[4] "In this book in effect appeareth the whole frame of the ancient common laws of this realm. . . . This grave and learned author will show as in this Mirror the great antiquity of the said courts of the common law, and particularly of the High Court of Parliament ever since the time of King Arthur who reigned about the year of our Lord 516," 9 Co. Rep. Pref. ib, vb, vi.

[5] "To speak what we think, we would derive from the Conqueror as little as we could," Third Instit. Pref.

—the facts being that the indictment was not of Wolsey at all, and that the passage as to subverting the common law was merely the common form used in any indictment under the statute of Præmunire.[1] The errors into which his endeavours to withdraw business from the Admiralty to the courts of common law led him, are well known, since they have been exposed by Prynne in the seventeenth century, and by Mr. Marsden in our own day.[2] Obviously this last illustration of Coke's use of his history to advocate his views is closely connected with the political uses to which he turned it.

We have seen that Coke's advocacy of the claims of the common law to be supreme in the state led him in his later years to become a leader of the Parliamentary opposition to the Stuart kings. We have seen that, though this change of front was the logical consequence of his advocacy of the claims of the common law, it involved a reconsideration of some of his earlier opinions on such matters of public law as the right of the crown to levy impositions and exact loans, and to commit to prison without cause shown.[3] In earlier days these recantations tended to make men believe in the infallibility of Coke. When men thought that the constitutional principles established in the seventeenth century were not merely beneficial to the state, but also incontestably sound law, the views of Coke on these matters in his published writings seemed to prove his legal infallibility on all matters.[4] But in our own days they have had the opposite effect. We see now that the public law of the seventeenth century was very obscure; and that, though the victory of constitutional principles was undoubtedly beneficial to the state, the legal principles upon which the leaders of the constitutional opposition relied were often very dubious. Hence we see in these recantations of Coke evidence of his political bias; and we are apt to doubt whether, in other branches of the law, he is so infallible as our forefathers thought

[1] Vol. iv 253, 257-258.

[2] Vol. i 553-554, 558; Prynne, Animadversions on Coke's Fourth Instit.; Marsden, Select Pleas of the Admiralty (S.S.); cp. also the remarks on his bias against the ecclesiastical courts in Jefferson v. the Bishop of Durham (1797) 1 Bos. and Pull. at pp. 109-110, a bias which led him astray in certain of the rules which he laid down in Liford's Case (1615) 11 Co. Rep. at f. 49b.

[3] Above 427-428.

[4] Thus the fact that vol. 12 of the Reports contained cases which reflected his earlier opinions (e.g. the Case of Non Obstante, 12 Co. Rep. 18, and the Case of Customs, ibid 33b) was put forward as an argument against the authority of this book; Hargrave, 2 S.T. 381, uses this argument with reference to the latter case, and Serjeant Hill with reference to the former; see above 462 n. 5. It is apparently forgotten that such cases as the Case of Prohibitions and the Case of Proclamations were also contained in it. It is obvious that parts 12 and 13 of the Reports have not the authority of the eleven parts, because Coke never revised them for the press; but it is clear that the Revolution settlement has had a good deal of influence upon the question which of the cases in these books should be regarded as authoritative.



him. I do not think that either line of argument is quite legitimate. We must separate Coke's views on matters which related to the political controversies of the day from matters which did not. And I think that on matters of law unconnected with these controversies a general charge of inaccuracy is not proved. No doubt dicta can be found which disparage his accuracy; but of the soundness of some of these dicta Mr. Wallace has, it seems to me, successfully disposed.[1] No doubt later cases have sometimes shown that Coke was wrong;[2] but they are very small in number compared with the cases in which his ruling has been accepted. No really certain conclusion could be arrived at, unless someone were to devote a lifetime to comparing the multitudinous references in his works to the Year Books and records, with the conclusions which he draws from them. But, in default of an inquiry on such a scale, I think that in fairness to Coke it should be remembered, firstly, that his skill as a reporter and the benefits which his Reports had conferred on the law were publicly recognized by the court of Star Chamber in 1613 in the decree made in the *Case of Priest and Wright*;[3] secondly, that his very

[1] The Reporters 173-193; the passages criticizing Coke there dealt with are to be found in 1 And. 71; Hob. 300; 2 Sid. 99; 1 Salk. 53, and Willes 569; W. Black 1234; it seems to me that Mr. Wallace's defence of Coke in these cases is made out; note especially the charge that in Gage's Case, 5 Rep. 45b, he has reported that the court decided exactly the reverse of what it did really decide; Mr. Wallace shows, op. cit. 191-192, from Moore 571, that the decision was as reported by Coke, but that it was reversed on appeal; that Willes C.J. considered that the reversal was to be supported rather on precedents than by reference to any sound principle; and that he admitted that "if this point were to come as a new question before me, I should be of the same opinion with Lord Coke"; in the Observations on Coke's Reports 18-19, he is accused of reporting Legat's Case (1613) 10 Co. Rep. 109, and the Case of Magdalen College (1616) 11 Co. Rep. 66, while writs of error were still depending.

[2] The following are a few instances: in Foster v. Jackson (1616) Hob. 52, and Williams v. Cuttryes (1601) ibid 62, a resolution in Blumfield's Case (1597) 6 Co. Rep. 86b, to the effect that if the party taken in execution for debt dies the debt is not released, is shown to be wrong; in Fowle v. Doble (1674) 1 Mod. 182 Vaughan C.J. questions the ruling in Sym's Case (1609) 8 Co. Rep. 51, as to vouching to warranty, and denies that the Y.BB. there cited bear out the resolutions reported; in Groenvelt v. Burnell (1700) 1 Ld. Raym. at p. 468, Holt C.J. questions an opinion expressed in Bonham's Case (1610) 8 Co. Rep. 121a; in Reg. v. Best (1705) 2 Ld. Raym. 1169, a ruling in Long's Case (1605) 5 Co. Rep. 122b, as to insufficiency of the wording of an indictment is questioned; in Jones v. Earl of Stafford (1730) 3 P. Wms. at p. 88, a dictum in Prince's Case (1610) 5 Co. Rep. 29b is said to be erroneous; Tyte v. Globe (1797) 7 T.R. 267, followed some earlier cases and overruled a ruling in Pilfold's Case (1613) 10 Co. Rep. 116a that if a statute, since the statute of Gloucester, gives damages in a new case, costs cannot be recovered; Serjeant Hill questioned a ruling founded on F.N.B. 163 in Specot's Case (1590) 5 Co. Rep. 59a; Foster, Crown Law 330-336, questions the reasons given in Powlter's Case (1611) 11 Co. Rep. at p. 35a for Coke's views as to the effects of 25 Henry VIII. c. 3 on benefit of clergy.

[3] Spedding, Letters and Life of Bacon iv 416—"Lastly, this honourable court much approving that which the right honourable Sir Edward Coke, knight, Lord Chief Justice of England, did now deliver touching the law in this case of *Duels*, hath enjoined his lordship to report the same in print, as he hath formerly done divers

able opponents Bacon and Ellesmere could not, though encouraged by the king, find any serious errors in his Reports, except in cases of a political or semi-political character;[1] and thirdly, that the able lawyers of his own day, who, because they were his contemporaries or immediate successors, knew the older authorities more intimately than we do, found no considerable faults. Let us remember that Bacon admitted that the Reports "though they may have errors, and some peremptory and extra-judicial resolutions more than are warranted, yet contain infinite good decisions and rulings over of cases";[2] and that even in the Observations on Coke's Reports it is admitted that, though there were certain things that were bad, and certain things that were mediocre, there were more things that were good.[3] In view of these facts I think that the view that Coke is inaccurate in his statements of law on matters unconnected with the political controversies of the day is not proved.

Let us now turn to the criticisms made by writers of another school.

(*b*) *The exceptions taken by the analytical jurists.*

Though Coke's use of history is often unhistorical, he was, for all that, a lawyer of the historical school. "Out of the old fields

other cases, that such as understand not the law in that behalf, and all others, may better direct themselves, and prevent the danger thereof hereafter"; for this case see above 200, 201; chapter lxxii of the Third Instit. is probably a summary of what he said on this occasion.

[1] The five points which the attorney and solicitor-general selected as erroneous were his views as to the assessment of sums for the repair of sea-walls in the Case of the Isle of Ely, 10 Co. Rep. 141; as to the legality of the dispensation in the Case of Monopolies, 11 Co. Rep. 84; as to the power of the common law to control Acts of Parliament in Bonham's Case, 8 Co. Rep. 107; and as to the power of the King's Bench to correct misdemeanours extra-judicial in Bagg's Case, 11 Co. Rep. 93; see Bacon's Works (ed. 1824) vi 399-408 for the objections and Coke's answers; cp. also a paper drawn up by Bacon of "Innovations introduced into laws and government," Spedding, Letters and Life of Bacon vi 90-93. It was in connection with this inquiry that the collection of cases entitled "Lord Chancellor Egerton's Observations on the Lord Coke's Reports" was drawn up; as Spedding says, ibid 87, "it does not appear by whom or upon whose authority the title was inserted"; the editor, following Mr. Laughton, among whose papers it was found, attributed it, without much positive evidence in favour of this hypothesis, to Lord Ellesmere. The four heads under which the cases contained in the book are arranged are (1) the rights of the Church, (2) the Prærogative of the King; (3) the power and jurisdiction of Courts and Commissioners; (4) the interest of the subject, ibid 88. Under each head instances from the reports are clearly and concisely stated, and a good many perfectly just criticisms upon the style and matter of some of the cases reported are made; as Sir F. Pollock says, L.Q.R. xxxvi 4, it is "such a memorandum as a secretary or officer of the Court might very well have prepared under Lord Ellesmere's direction, and Lord Ellesmere himself conceivably, though not very probably, have copied from the subordinate's draft—it might even be with amendments or added touches of his own"; for illustrations of these criticisms see above 430 n. 3, 464 n. 6.

[2] Proposition touching the compiling and amendment of the Laws of England, Spedding, Letters and Life of Bacon vi 65.

[3] "In the perusal of all his works it may be truly said of them, Sunt quædam mala, sunt quædam mediocria, sunt bona plura."



must grow the new corn," was a favourite proverb of his—out of the old authorities in the law must come the new rules and principles needed to guide the activities of all men in the English state. And he had all the defects of the historical lawyer in an exaggerated form. He is ready with an explanation, and sometimes with a defence, of all the anomalies which disfigured the law. He almost justifies trial by battle;[1] and he regrets the decay of the cumbersome apparatus of the real actions.[2] He is ready also with detailed explanations of all the technical rubbish with which the premature hardening of the procedural rules of the common law into a definite system had burdened it;[3] and between explanation and justification it never occurred to him that there could be any distinction. Though he was a master of the principles of the common law, his statement of these principles was often obscured in his writings by the mass of detail with which it was accompanied;[4] distinctions were sometimes drawn where no real differences existed; and fundamental differences were sometimes not sufficiently emphasized.[5]

[1] Second Institute 247—It (trial by battle in a writ of Right) "was instituted upon this reason, that in respect the tenant had lost his evidences, or that the same were burnt or embezzled, or that his witnesses were dead, the law permitted him to try it by combat . . . hoping that God would give victory to him that right had"; cp. Third Instit. 159—"And this kind of battail, in case of Appeals and writ of Right, is by publick authority and course of law, whereunto all people by an implied consent are parties; and (as some hold) hath his warrant by the word of God, by the single battail between David and Goliah, which was strucken by publick authority."

[2] 8 Co. Rep. Pref. xxvii-xxviii—"The neglect of Assises and real actions hath produced two inconveniences in the Commonwealth, and a third is . . . like to insue: (1) the multitude of suits in personal actions, wherein the realty of freehold and inheritance is tried, to the intolerable charge and vexation of the subject. (2) Multiplication of suits in one and the same case; wherein often times there are divers verdicts on the one side and divers on the other [see above 323, 336] . . . (3) The discontinuance of real actions will produce in the end two dangerous effects, *viz.* want of true judgment in the Professors of the Law, and gross ignorance in Clerkes of the right Entries and Proceedings in those cases"; cp. Ferrer's Case (1599 6 Co. Rep. at p. 9a.

[3] See e.g. Beecher's Case (1609) 8 Co. Rep. 58a; Blackamore's Case (1611) ibid 156a—he explains at p. 159a why error in the form of the original writ is not amendable—"Original writs are the foundation upon which the whole law depends, and therefore if the form of original writs shall be neglected, Ignorance, the mother of error and barbarousness, will follow . . . in subversion of the antient law of the land, for in this case it is true that *forma dat esse;*" this might be a good enough explanation of the old strict rules; but it was hardly applicable to the law of Coke's day, when the distinctions between the forms of action were being rapidly undermined by the growth of the offshoots of Trespass; certainly it was no justification for the refusal of the court to allow a reasonable latitude of amendment.

[4] This is especially noticeable in the First Institute, above 467.

[5] Hobbes remarks, Dialogue of the Common Laws (Works vi at pp. 74, 75), that "Sir Edward Coke does seldom well distinguish, when there are two divers names for one and the same thing; though one contain the other, he makes them always different"; Stephen, H.C.L. ii 206 n. 1, adds that "when one name applies to two things he makes them always the same"; the author of the Observations on Coke's Reports says at p. 20 that "a clear case is clouted and obscured by the

At the same time he has all the good points of the historical lawyer. The analytical lawyer usually bases his analysis mainly upon the ideas current in his own day. However much he may wish to do so, he can never wholly emancipate himself from the intellectual atmosphere in which he lives. He is therefore inclined to reject as useless all that is not in accord with these current ideas. But the historical lawyer preserves the ideas of past ages; and these ideas often come into their own again in a future age. Coke's writings preserved for England the mediæval idea of the supremacy of the law, at a time when political speculation was tending in the direction of the supremacy of a sovereign person or body which was above the law;[1] and the obscurity and indefinite character of some of the mediæval rules of law which he states, preserved for the common law a flexibility, which is the condition precedent for natural development and expansion.

As Coke's writings thus possess all the vices and virtues of the historical lawyer in an exaggerated degree, they have naturally attracted the censure of those whose minds are cast in an analytical mould. And in one of Coke's younger contemporaries was to be found a mind which combined great learning with extraordinary powers of logical analysis. We shall see that Thomas Hobbes was the first Englishman to apply his gifts of logical analysis to explain to his fellow-countrymen the comparatively new doctrine of sovereignty, and to show them how the application of this doctrine to the political facts of the day would clear up all the existing political perplexities. This meant that he approached English constitutional law and the political theories which underlay it from a new and a critical standpoint. But as English constitutional law was and is a part of the common law, it was inevitable that he should extend his criticism to the common law generally. It was during the Great Rebellion that Hobbes was elaborating his theories. At that time Coke had come to be regarded as the greatest authority on the common law, so that Coke's views upon the constitutional theory of the English State had come to be the views of most common lawyers, and of many statesmen. But Coke's law and political theories were essentially mediæval, and therefore wholly illogical from the standpoint of the new doctrine of sovereignty. It was natural therefore that Hobbes should select Coke's books as the type and model of that obsolete mediævalism in law and politics which he was making it his chief endeavour to combat.

subtlety of a difference he adjoineth of his own," and he gives as an instance Adams and Lambert's Case (1603) 4 Co. Rep. 104.

[1] Vol. iv 192.



It was natural also that, in the light of his new principles, he should find much to condemn in many of the rules of a system of law, which, however well they could be explained historically, were obviously unsuited to the needs of the modern state.

It is not therefore surprising that, in his "Dialogue of the Common Laws," Hobbes attacked Coke's legal theories with those analytical weapons which Austin has made familiar to modern lawyers, and the subject matter of some of the rules laid down by him, with those arguments based on reason and utility which Bentham was later to urge with so great an effect. There is a very modern ring in his criticisms. Law, he says, should not be defined as a "Sanctio justa, jubens honesta, et prohibens contraria." Rather it is the command of a sovereign, which, though it may be iniquitous, cannot be unjust.[1] Neither case law[2] nor custom[3] is truly law. Law is no product, as Coke would have it, of artificial reason:[4] it should be so clear to the ordinary reason of mankind that a layman should be able to give as good an opinion as to its meaning as a lawyer.[5] The absurd rules which Coke either explains or defends should be altered;[6] and the useless distinctions which he invents should be declared to be baseless.[7] Hobbes's criticisms were approved by Sir James Stephen;[8] but we should do well to remember that Stephen, though he was the historian of our criminal law, had the mind of an analytical jurist; and that his greatest work was done in the sphere of codification. Nor would his criticism have been wholly approved by our greatest analytical jurist. When we read his

[1] Works of Hobbes vi 25, 26—"that which I most except against in this definition, is, that it supposes that a statute made by the sovereign power of a nation may be unjust. There may indeed in a statute law, made by men, be found iniquity, but not injustice"; "a law is the command of him or them that have the sovereign power, given to those that be his or their subjects, declaring publicly and plainly what every of them may do, and what they must forbear to do."

[2] "I suppose that he [Coke] means that the reason of a judge or of all the judges together, without the king, is that summa ratio, and the very law: which I deny, because none can make a law, but he that hath the legislative power," ibid 5; "no record of a judgment is a law, save only to the party pleading, until he can by law reverse the former judgment," ibid 54; cp. Leviathan 144.

[3] "I deny that any custom of its own nature can amount to the authority of a law," ibid 62.

[4] Case of Prohibitions (1608) 12 Co. Rep. at p. 65, cited vol. i 207 n. 7.

[5] "Though it be true that no man is born with the use of reason, yet all men may grow up to it as well as lawyers; and when they have applied their reason to the laws . . . may be as fit for and capable of judicature as Sir Edward Coke himself," Works of Hobbes vi 14; in the Leviathan at p. 146 he maintains, logically enough, that therefore the judges who interpret the law need only be (like the Lords of Parliament) men of sound sense with a competent knowledge of statute law; and that they need not be students of the law—study of the law being needed only for the profession of an advocate.

[6] Ibid 137—the forfeiture of the goods of one who, after fleeing for felony, has been acquitted; ibid 92-94 as to things which cannot be the subject of larceny—as to this see vol. iii 367-368.

[7] Ibid 73-75.

[8] H.C.L. ii 206 n. 1.

condemnation of Coke's disorderly mind, of his technical and pedantic divisions, of his puerile and self-contradictory speculations,[1] let us remember that, in Austin's opinion, Coke's mastery of the English legal system as a whole was equalled only by the mastery of their own system possessed by the great Roman jurists.[2]

In that school of historically-minded common lawyers, which had grown up round Selden and Cotton in the earlier half of the seventeenth century,[3] there were plenty of men who were capable of applying a reasoned criticism to Hobbes's views. And in fact Matthew Hale, one of the youngest and most eminent of that school, has left us such a criticism.[4] Hale was perhaps the best equipped of all the lawyers of his day for such a task; for, as we shall see,[5] he was a philosophic jurist, a first-rate legal historian, and a master of the common law. His tract is divided into two parts. The first part deals with "Laws in Generall and the Law of reason";[6] the second with "Soveraigne Power."[7]

In the first part Hale meets Hobbes on his own ground. He admits that law should be tested by reason; and he begins by distinguishing between different meanings and applications of reason.[8] For the purpose of his argument the most important application of reason is, "Where the reasonable facultie is in conjunction with the reasonable subject, and habituated to it by use and exercise, and it is this kind of reason, or reason thus taken that denominates a man a mathematician, a philosopher, a politician, a physician, a lawyer."[9] Men may have equally great powers of reasoning; but if a man applies his powers to any particular science he will naturally excel others who have used thei. reasoning powers in other ways.[10] Of all sciences the most difficult is that of the laws for the "ordering of civill societies and for the measureing of right and wrong," because it is not only necessary to have, as in the "mathematical sciences," correct general notions and to reason from them correctly; it is necessary also to apply them correctly to particular cases.[11] In this art mere

[1] "A more disorderly mind than Coke's and less gifted with the power of analysing common words it would be impossible to find. His divisions are all technical and pedantic, running upon words instead of facts, and the speculative parts of his writings are mostly puerile and often contradictory," H.C.L. ii 206.

[2] Jurisprudence ii 1130—"It [the mastery of the legal system as a whole] was possessed by Coke . . . between whom and the Roman lawyers, the resemblance is striking."

[3] Above 402-403.

[4] Reflections by the Lrd Chiefe Justice Hale on Mr. Hobbes his Dialogue of the Law, Harl. MS. 711 ff. 418-439, printed in App. III.; the following references are to the pages of this tract appearing in the MS.

[5] Vol. vi 581-585. [6] Pp. 1-22. [7] Pp. 22-43.
[8] Pp. 1-7. [9] P. 5. [10] Pp. 6-7.

[11] "Of all kind of subjects where about ye reasoning Facultie is conversant, there is none of so greate a difficulty for the faculty of reason to guide it selfe and come to



reasoning fails.[1] Thus we find that philosophers generally make "the worst judges that can be because they are transported from the ordinary measures of right and wrong by their overfine speculations, theoryes, and distinctions above the common staple of humane conversations";[2] while "men of observation and experience in humane affaires and conversation between man and man make many times good judges."[3]

As, then, pure reason often fails us when we come to apply general principles to particular cases, as it is above all necessary that the law should be certain, "the wiser sort of the world have in all ages agreed that it is absolutely necessary that the rules of law should be fixed and settled."[4] No doubt the fixity of these rules may sometimes work hardship in particular cases; but obviously the evil would be greater if there were no certain rules at all.[5] The justification for the fixity of its rules is the balance of convenience;[6] and both the legislator and the judge must always have before their minds in making and expounding laws this necessity of balancing convenience against inconvenience.[7] Now in this difficult task of judging the reasonableness of a law we should consider that the presumption is in favour of laws made by men of experience,[8] and of laws by which "a kingdome hath been happily governed four or five hundred yeares."[9] Further, as certainty is a great object, we should presume in favour of

any steddiness as that of laws, for the regulation and ordering of civill societies and for the measureing of right and wrong, when it comes to particulars. And therefore it is not possible for men to come to the same certainty, evidence, and demonstration touching them as may be expected in mathematicall sciences, and they that please themselves with a perswasion that they can wth as much evidence and congruitie make out an unerring systeme of laws and politiques equally applicable to all states and occasions, as Euclide demonstrates his conclusions, deceive themselves with notions wch prove ineffectuall, when they come to particular application." p. 7.

[1] "In moralls and especially with relation to lawes for a communitie, tho the common notion of just and fitt are common to all men of reason, yett when persons come to particular application of those common notions to particular instances and occasions wee shall rarely finde a common consente or agreement between men tho of greate reason, and that reason improved by greate study and learning, wittness the greate disagreement, between Plato and Aristotle. . . . And lett any man but examine the weightiness of those men that pretend to be ye greate masters of reason and possibly they may be excellent men: yet no persons differ more than they touching things of this nature. And tho they perchance have this happiness to shake and weaken one the others principles or conclusions, yett when they sett up their own positions they are weake and generally displeasing," p. 8.

[2] P. 9. [3] Ibid. [4] Pp. 9, 10. [5] P. 10.

[6] "Yett certain it is that that law is best framed that at once hath certainty, and yett induceth as few particular mischiefs as may be. And hence it is, that it is a thing of greatest difficulty, so to contrive and order any lawe that while it remedyes or provides agst one inconvenience, it introduceth not a worse or any equall," p. 11.

[7] Pp. 11-13. [8] P. 14.

[9] "It is a reason for me to preferre a law by wch a kingdome hath been happily governed four or five hundrd yeares than to adventure the happiness and peace of a kingdome upon some new theory of my owne, tho' I am better acquainted with the reasonableness of my owne theory than wth that law," ibid.

institutions and rules which have been settled by long experience, "though the particular reason of the institution appeare not."[1] It follows that a trained common lawyer who has spent his life in studying the law "will be much better fitted for right judgement therein, than he that hath no other stock to trade upon than the bare exercise of his faculty of reason, or that hath only taken the paines to read over the Titles of the Statutes or Indexes or Repertoryes of some Law Books."[2] For, "itt is not impossible but that at least some of those that have applied themselves to the studye of the laws have as farr a measure of naturall reason, as those that have adicted themselves to philosophy or other studyes, and possibly would have proved as good proficients in them had they applyed and habituated their reason to those studyes"[3]—a glance at that intellectual superiority which philosophers, legal or otherwise, then as now assume over the students of those other sciences which can produce results so tangible and undisputed as law. Thus, if the certainty of the law is to be secured, a legal training is essential, and this training is also essential if its uniformity and continuity are to be preserved.[4] The conclusion implied, though not expressed, is, that we can expect very little practical result from a priori criticisms upon law made by philosophers, like Hobbes, who are merely smatterers in legal knowledge.

It may be said that Hale, in common with most lawyers of his day, was too intolerant of the criticism of laymen, who after all felt the pinch of defects in the law; that he sometimes writes as if law existed for its own technical sake; and that he is too apt to think that, because a rule of law is settled, nothing more can be said. This criticism is to a certain extent justified, but, on the whole, Hale is very free from these faults. We shall see from his tract on the Amendment of the Laws that he could criticize the law as well as expound it;[5] for he was not only a

[1] P. 16—"'Tis a foolish and unreasonable thing for any to find fault wth an institution because he thinkes he could have made a better, or expect a mathematicall demonstration to evince the reasonableness of an institution or the selfe evidence thereof."

[2] P. 18.

[3] P. 19.

[4] "It is one of the thinges of greatest moment in the profession of the common law to keepe as neare as may be to the certainty of the law, and the consonance of it to it selfe, that one age and one tribunall may speake the same things and carry on the same thred of the law in one uniforme rule as neare as is possible; for otherwise that wch all places and ages have contended for in laws, namely certainty and to avoid arbitrariness and that extravagance that would fall out if the reasons of judges and advocates were not kept in their traces, wold in halfe an age be lost. And this conservation of laws within their boundes and limitts could never be, unless men be well informed by studyes and readeing what were the judgemts and resolutions and decisions and interpretations of former ages," pp. 20, 21; and at pp. 21, 22, it is pointed out that this same knowledge is also needed for the orderly exposition of statutes.

[5] Vol. vi 592-594.



practitioner of the common law, he was also a legal historian and a student of Roman law. He defended the complexity of laws and institutions, because he knew something of the complicated causes that had given them their present shape.[1] Both his technical training, and his wide intellectual outlook, led him to distrust the simple reasoning of the analytical philosopher. That he was justified in this distrust we can see more clearly than men like Stephen, who lived when the influence of Bentham and Austin was at its height. And, though the victory of the views of Coke and Hale caused both the political theory of the English state and the rules of English law to lose the clearness and certainty which the victory of Hobbes's views would have given them, yet, we shall see, that both the world of politics and the world of law have in the long run been the gainers; for the victory of these views prevented a large breach in the continuity both of the political theory of the English state, and of many fundamental rules of English law, at a time when a preservation of this continuity was a condition precedent to the establishment of constitutional government, and to the orderly development of the common law.[2]

Hale's defence of the laws of England would have been incomplete if it had rested here; for it would have failed to deal with the major premise on which Hobbes's reasoning was founded —his theory of sovereignty. Hale takes up this subject in the second part of his tract; but the main interest of this part of the tract is the insight which it gives us into the minds of the political thinkers of the latter part of the seventeenth century. I shall therefore speak of it in the following chapter in which I discuss the public law of that century.

Hobbes and Stephen saw part of the truth, but not the whole. At the end of the sixteenth century it was obvious to the leading lawyers and statesmen of the day that some kind of restatement of the law was necessary.[3] Bacon had summed up

[1] "Ye texture of humane affaires is not unlike the texture of a diseased bodey labouring under maladies, it may be of so various natures that such phisique as may be proper for the cure of one of the maladies may be destructive in relation to ye other, and ye cure of one disease may be the death of the patient," p. 11.

[2] Below 489-490, 492-493.

[3] A project, "To enter into a general amendment of the state of the laws, and to reduce them to more brevity and certainty," had been before Parliament in 1593, see the Dedicatory Epistle to Bacon's Maxims of the Law, Works (Ed. Spedding) vii 316; of this project Bacon never lost sight; in 1614 he addressed to the king, "A memorial touching the review of penal laws and the amendment of the common law," Spedding, Letters and Life v 84-86; in 1616 he addressed to the king a more elaborate proposal, "Touching the compiling and amendment of the laws of England," ibid vi 61-71; in 1623, in Bk. viii c. 3 of the De Augmentis, a good many of these proposals were repeated and enlarged; what follows in the text is based on the two last-mentioned works; James himself was conscious of the need for reform, see his speeches to Parliament in 1607 and 1609, Works 512, 533-534.

tersely and accurately some of the chief defects from which it was suffering. "Certain it is," he wrote,[1] "that our laws, as they now stand, are subject to great incertainties, and variety of opinion, delays, and evasions: whereof ensueth (1) that the multiplicity and length of suits is great. (2) That the contentious person is armed, and the honest subject wearied and oppressed. (3) That the judge is more absolute; who, in doubtful cases, hath a greater stroke and liberty. (4) That the chancery courts are more filled, the remedy of law being often obscure and doubtful. (5) That the ignorant lawyer shroudeth his ignorance of law in that doubts are so frequent and many. (6) That men's assurances of their lands and estates by patents, deeds, wills, are often subject to question, and hollow; and many the like inconveniences."

But what form should this restatement take? It was clear, at any rate to Bacon—the man whose legal and philosophical eminence best fitted him to give an opinion on such a question—that the construction of a logical code was impossible. "I dare not," he wrote, "advise to cast the law into a new mould, . . . for such a remove I should hold indeed for a perilous innovation."[2] It was, he saw, politically impossible; and it is clear from the De Augmentis that there was a good deal in the existing institutions of English law which he did not wish to see changed. He accepts and approves the existence of separate courts administering civil and criminal equity on the principles of the court of Chancery and the Star Chamber.[3] He approves the authority given in English law to reported cases,[4] and disapproves the institution of binding responsa.[5] He accepts the existence of courts of co-ordinate jurisdiction, and lays down rules for their relations *inter se*, not unlike those which have ultimately prevailed.[6] In his opinion the complete codification of the law was not the best remedy. "Sure I am," he said, "there are more doubts that arise upon our statutes, which are a text law, than upon the common law, which is no text law."[7] That Bacon's

[1] Spedding, Letters and Life vi 64.

[2] Ibid 67; and see ibid 18-19 for the praise which he bestowed on the common law in his letter of advice to Villiers.

[3] Bk. viii c. 3 Aph. 32-46. See Aph. 45—"Apud nonnullos receptum est, ut jurisdictio, quæ decernit secundum æquum et bonum, atque illa altera, quæ procedit secundum jus strictum, iisdem curiis deputentur; apud alios autem, ut diversis. Omnino placet curiarum separatio. Neque enim servabitur distinctio casuum, si fiat commixtio jurisdictionum: sed Arbitrium Legem tandem trahet."

[4] "Judicia enim anchoræ legum sunt, ut leges reipublicæ," Aph. 73.

[5] "Jura a juratis judicibus sumunto," Aph. 90. [6] Aph. 95-97.

[7] Spedding, op. cit. vi 67—"It is too long a business to debate whether *lex scripta aut non scripta*, a text law or customs well registered, with received and approved grounds and maxims, and acts and resolutions judicial from time to time duly entered and reported, be the better form of declaring and authorizing laws. . . . Customs are laws written in living tables; and some traditions the Church doth not disauthorize. In all sciences, they are the soundest that keep close to particulars;



opinion was wise we can see if we take any of our great codifying statutes of the nineteenth century, and ask ourselves what kind of a codifying statute would have been produced, if that branch of the law had been codified in the sixteenth century.

Bacon suggested a very much more conservative measure of law reform—of a sort not unlike that which Justinian applied to Roman law.[1] The law was to be restated; and, as thus restated, it was to consist of two main parts—a digest of case law and a digest of statute law. In addition there were to be two auxiliary parts—a book de antiquitatibus juris, and certain other books "that conduce to the study and science of the law."[2]

The digest of case law was to be compiled from the Year Books and reports. Obsolete and overruled cases were to be omitted. When a case merely repeated the decisions previously settled, the bare decision was to be retained. Reports which were too prolix were to be pruned. Contradictory rulings were to be settled by Parliament or the judges. In the De Augmentis Bacon made a further suggestion to obviate one of the greatest defects of a system of case law—the defect, namely, that the solution of doubtful points of law depends upon the accident of a case arising for decision, and the willingness of the litigants to fight it. He suggested that difficult points of law might be referred to the judges from the king or state, and that they, after argument, should give an authoritative decision.[3] The digest of statute law was to purge the statute book of obsolete laws, penalties were to be mitigated, and statutes dealing with the same subject matter were to be consolidated. Bacon suggested later that these digests should not supersede wholly the material upon which they were based. "It will be expedient in this new digest of laws, that the old volumes do not altogether perish and pass into oblivion; but that they be preserved at least in libraries, though the ordinary and promiscuous use of them be prohibited. For in important cases it will not be amiss to

and sure I am there are more doubts that rise upon our statutes, which are a text law, than upon the common law, which is no text law."

[1] "Id quod fecit Tribonianus in Digesto et Codice," De Augmentis, Bk. viii c. 3 Aph. 61.

[2] Spedding, op. cit. vi 68-71.

[3] Aph. 92—"Judicium igitur solummodo tam judicia, quam responsa et consulta sunto. Illa de litibus pendentibus; hæc de arduis juris quæstionibus in thesi. Ea consulta, sive in privatis rebus, sive in publicis, a judicibus ipsis ne poscito (id enim si fiat, judex transeat in advocatum) sed a principe aut statu. Ab illis ad judices demandentur. Judices, vero, tali auctoritate freti, disceptationes advocatorum, vel ab his, quorum interest, adhibitorum, vel a judicibus ipsis, si opus sit, assignatorum, et argumenta ex utraque parte, audiunto; et re deliberata jus expediunto et declaranto. Consulta hujus modi inter judicia referunto et edunto, et paris auctoritatis sunto;" the idea is a good one; but the only approach to anything like carrying it out is to be seen in the power of the Crown to refer points of law to the Judicial Committee of the Privy Council, vol. i 524-525.

examine and consider the successive changes which have taken place in past laws. And surely it is a reverent thing to intermingle antiquity with things present." [1]

What Bacon meant by a book "de antiquitatibus juris" he tells us in the De Augmentis. "By antiquities of laws, I understand, those writings on laws and judgments, whether published or unpublished, which preceded the body of the law." [2] The book was to be compiled from the records.[3] The statements contained in it were to be regarded as "reverend precedents," but not as "binding authorities." The other books "conducing to the study and science of the law" were to be three in number. Firstly, a book of Institutes. This was to be "a key and general preparation to the reading of the course." It was to be clear in method, and of "a universal comprehension . . . like a model towards a great building." [4] It should be confined to private law.[5] Secondly, a treatise "de regulis juris," designed to explain accurately the leading principles of the law [6]—those "general dictates of reason, which run through the different matters of law, and act as its ballast." [7] Thirdly, a book of terms of the law. This was to be a dictionary both of ancient and modern words, arranged, not according to the order of the alphabet, but on the principle of putting together words relating to the same thing, that one might explain the other.[8]

[1] Aph. 63—"Consultum fuerit in Novo Digesto Legum, vetera volumina non prorsus deleri et in oblivionem cedere, sed in bibliothecis saltem manere; licet usus eorum vulgaris et promiscuus prohibeatur. Etenim in causis gravioribus, non abs re fuerit, legum præteritarum mutationes et series consulere et inspicere; ac certe solenne est antiquitatem præsentibus aspergere;" the translations in the text here and elsewhere are Spedding's.

[2] Aph. 86—"Pro antiquitatibus autem legum habeantur scripta circa leges et judicia; sive illa fuerint edita, sive non, quæ ipsum corpus legum tempora præcesserunt."

[3] "All ancient records in your tower or elsewhere, containing acts of Parliament, letters patents, commissions, and judgments, and the like, are to be searched, perused and weighed. And out of these are to be selected those that are of most worth and weight; and in order of time, not of titles . . . to be set down and registered; rarely *in hæc verba;* but summed with judgment, not omitting any material part," Spedding, op. cit. vi 68.

[4] "For the Institutions I know well there be books of introductions (wherewith students begin) of good worth, especially Littleton and Fitzherbert; *Natura Brevium;* but they are no ways of the nature of an *Institutions;* the office whereof is to be a key and general preparation to the reading of the course," ibid 70.

[5] De Augmentis, Bk. viii c. 3 Aph. 80—"Jus publicum in institutionibus ne attingito; verum illud ex fontibus ipsis hauriatur."

[6] The maxims were to be "made useful by good differences, amplifications, and limitations, warranted by good authorities; and this not by raising up of quotations and references, but by discourse and deducement in a just tractate," Spedding, op. cit. vi 70. Bacon's book on Maxims of the Law, Works (Ed. Spedding) vii 325-387, shows how he would have done the work; he said that it was a new departure; as we have seen, above 398-399, it was very soon imitated by other text-book writers.

[7] De Augmentis Bk. viii c. 3 Aph. 82—"Sunt dictamina generalia rationis, quæ per materias legis diversas percurrunt, et sunt tanquam Saburra Juris."

[8] Spedding, op. cit. vi 70—"Not only the exposition of terms of the law, but of the words of all ancient records and precedents;" De Augmentis Bk. viii c. 3 Aph. 81—"Tractatum autem istum per literas alphabeti ne digerito. Id indici alicui relinquito: sed collocentur simul verba, quæ circa eandem rem versantur; ut alterum alteri sit juvamento ad intelligendum."



Bacon's little book on the Maxims of the Law shows that if he had had the leisure to accomplish this scheme of reform, he, and he alone, was the man for the task. Many another lawyer could have stated legal propositions accurately. He alone had the philosophical capacity, the historical knowledge, and the literary taste needed to select the subject matter and to shape the form of the books in which English law was to be restated. And, if his scheme had been accomplished, there is no doubt that he was right in thinking that there would be many who would question whether, as a lawyer, he was not Coke's superior.[1] Hobbes, and many another thinker whose minds were cast in an analytical mould—many a lawyer who had learned from Bacon's books and from the reformed Corpus of the common law—would have had no doubt on this matter. But this was not to be. Political reasons rendered Bacon's scheme impossible of realization at the time when it was propounded; and, at a later period, the merits of Coke's writings rendered the necessity for such a restatement less pressing.

Coke's writings have, it seems to me, five very considerable merits.

(1) They cover the whole field of English law, and restate it from the point of view of the sixteenth century. It was a century in which there had been enormous changes in men's religious and political ideas,[2] and an enormous mass of legislation directed to settling the nation on the basis of these new ideas.[3] A great deal of restatement was therefore needed to bring the mediæval basis on which the law rested into harmony with the new situation. Indeed, in any age in which changes of this sort have taken place, the law will need to be thus reconsidered and restated. We in the last century have seen much of our old case law thus treated; and it is not one of the least of the advantages of our system of case law that it can thus be adapted to a new environment. What a succession of eminent lawyers have done for the common law in the last century Coke accomplished for the common law in his own day. "Coke's books," the late Professor Maitland once wrote in a letter to me, "are the great dividing line, and we are hardly out of the Middle Age till he has dogmatized its results." [4]

[1] Spedding, Letters and Life of Bacon vi 70—"And I do assure your Majesty, I am in good hope, that when Sir Edward Coke's Reports and my Rules and Decisions shall come to posterity there will be (whatsoever is now thought) question who was the greater lawyer." [2] Vol. iv 11 seqq. [3] Ibid c. ii.

[4] So Butler said, Reminiscences i 118—"The most advantageous and perhaps the most proper point of view in which the merit and ability of Sir Edward Coke's writings can be placed, is by considering him the centre of modern and ancient law."

(2) They deduce from the scattered and often inconsistent dicta in the Year Books positive rules of law. All through his writings Coke is reconciling Year Books. We could with considerable justice apply to his work the title applied to Gratian's work—"Concordia discordantium canonum." And he did his work so skilfully that later lawyers were, for ordinary purposes, content to accept his reading of these older authorities. The decline in the practical utility of the Year Books and the abridgments of the Year Books, dates from the publication of Coke's Reports and Institutes.[1]

(3) His writings not only brought the Year Books into line with the modern reports, they brought the mediæval literature of the common law into line with the modern literature. The great mediæval books—Glanvil, Bracton, Britton, and Fleta—were made to explain and illustrate the law expounded by Perkins, Fitzherbert, Staunford, and Lambard.

(4) By the information which they gave of the doings of other courts—notably the court of Star Chamber, the court of Chancery, the court of Admiralty, and the court of Wards—they tended to familiarize the common lawyers with the new ideas, emanating from those courts, which were giving rise to new legal developments. As I have already pointed out, they made it easier for the common law to fill the great position which it acquired as a result of the constitutional conflicts of the seventeenth century.

(5) As a result his writings ensured the continuity of the development of the common law amidst all the vast changes of this century of Renaissance, Reformation, and Reception. This signal merit of Coke's writings was fully recognized in his own day. "Had it not been for Sir Edward Coke's Reports," wrote Bacon,[2] "the law by this time had almost been like a ship without ballast; for that the cases of modern experience are fled from those that are adjudged and ruled in former times."

### *Coke's Influence on the Development of English Law in the Succeeding Centuries*

We have seen that Coke's mental attitude and political outlook were those of a statesman of the Tudor period. Naturally the results of his work have all the characteristics of the Tudor

[1] "Coke's *Institutes* have had a greater influence on the law of England than any work written between the days of Bracton and those of Blackstone. When the older learning became obsolete, Coke came to be regarded more and more as a second father of the law behind whose works it was not necessary to go," Stephen, H.C.L. ii 205; "were it not for his writings we should still have to search for it (the ancient law) in the voluminous and chaotic compilation of cases contained in the Year Books; or in the dry though valuable abridgments of Statham, Fitzherbert, Brook, and Rolle," Butler, Reminiscences i 118-119.

[2] Spedding, Letters and Life of Bacon vi 65.



statesmanship. In fact, his work was the complement of the statesmanship which had adapted the mediæval institutions of the English state to modern needs, without any appreciable sacrifice of the mediæval ideas contained in them.[1] His writings had so restated the mediæval common law that it was made fit to bear rule in the modern English state; and both in his writings and throughout his active career he had maintained that this common law ought to be the supreme law in and over the state. The Great Rebellion proved that the theory of the state based on the sovereignty of the king, which the earlier Stuarts wished to substitute for the balanced Tudor polity, was impossible in England;[2] and therefore caused the views expressed in the writings of the man who represented the ideals of the Tudor polity to prevail. It followed that, just as the Tudor statesmanship fixed the form and determined the manner of the development of the modern English state, so Coke's work fixed the form and determined the manner of the development of our modern English law. The effect of his work, therefore, both for evil and for good has been both vast and permanent.

It can hardly be denied that the victory of Coke's views has had unfortunate effects both upon the form and upon certain parts of the substance of English law. It has had unfortunate effects upon the form of English law, because the very conservative character of his writings has led to the retention in that law of rules and doctrines which were already almost obsolete in his day. All the mediæval books as well as all the modern reports could and can be cited as authorities. The statute book badly needed revision in Elizabeth's reign;[3] but no revision was undertaken till the nineteenth century. The result was that the bulk and complexity of the law were enormously increased; and, till the reforms of the last century, the line between obsolete and living law was very hard to draw. Even at the present day it is sometimes not very distinct. The victory of Coke's views has also had unfortunate effects upon some parts of the substantive rules of English law. The jurisdiction over commercial and many maritime causes was, as we have seen, transferred from the court of Admiralty to the courts of common law and the court of Chancery.[4] Since the law administered by the Admiralty was

[1] Vol. iv. 209. [2] Vol. vi. 203-208.

[3] As Bacon said, Spedding, Letters and Life of Bacon vi 65—"There is such an accumulation of statutes concerning one matter, and they so cross and intricate, as the certainty of law is lost in the heap; as your Majesty had experience last day, upon the point whether the incendiary of Newmarket should have the benefit of his clergy;" no better illustration than Benefit of Clergy (vol. iii 294-302) could be given of the evil effects of the retention of obsolete rules which obscured the law.

[4] Vol. i 556-558, 570-573; above 153-154.

based to a large extent upon the civil law, it was in closer touch with the contemporary commercial law of continental states, and therefore better fitted than the English common law to do justice in such cases.[1] The result was that the growth of these branches of law in this country has been comparatively slow. Till the codifying statutes of the nineteenth century, English law could show no measure dealing with these topics comparable with the French "Ordonnances" of two centuries earlier;[2] and, till the reforms of the same century, our law of bankruptcy was a disgrace to a civilized community.[3]

On the other hand, although the progress was slow, the common law, assisted by the legislature, has shown a capacity for expansion, which has enabled it to fill the position which Coke's career and writings, and the issue of the constitutional controversies of the seventeenth century, won for it. And, in consequence, English law has become a very much more uniform system than it would otherwise have been. If English law had been restated in the seventeenth century on the lines advocated by Bacon, we should probably by this time have had a very much more variegated system. The Admiralty, the Star Chamber, and the ecclesiastical courts would all have put forward their claims; and these rivals of the common law would have obtained a permanently larger share of jurisdiction. I have already pointed out[4] that the result of the successful assertion by the court of Chancery of its claim to a jurisdiction independent of and in some respects superior to that of the common law courts, has split our English system into two halves. It is therefore very probable that, if all the other rivals of the common law had been equally successful, the English legal system would have been split into many fragments. Coke's writings were largely instrumental in saving English law from this fate; for, if he had not restated and adapted its principles to modern needs, even the victory of the Parliament could hardly have enabled it to gain so decisive a victory over its rivals. That it would have disappeared I do not assert: but I think that it might have sunk to the position of one among many equals; and if this had happened, it would have ceased to be the supreme law of king and people.

And in this question of the future position of the common law more was at stake than the rivalries of competing courts, or the form of English law. If the common law had lost its supremacy would Parliament have gained the victory? And if it had gained the victory without the help of a common law which claimed to be the supreme law in the state, would our constitutional law be

[1] Vol. i 555; above 138, 152-153.
[2] Vol. vi 300-301.
[3] Vol. i 471-473.
[4] Vol. iv 279, 287-288; above 236-238.



what it is to-day? This may well be doubted.[1] In the past the lawyers had helped to make the English Parliament an efficient representative assembly.[2] In the seventeenth century the Parliament handsomely repaid this debt by helping Coke and his fellow lawyers to maintain the mediæval conception of the supremacy of the common law, and to apply this conception to the government of a modern state.[3] It was in Coke's writings that this and other mediæval conceptions were given their modern form; and therefore it is largely owing to the influence of his writings that these mediæval conceptions have become part of our modern law. If their influence upon some parts of our modern law has not been wholly satisfactory, let us remember that they saved Englishmen from a criminal procedure which allowed the use of torture,[4] and that they preserved for England and the world the constitutional doctrine of the rule of law.

The effects of these achievements, both in the sphere of criminal and of constitutional law, were destined in the succeeding ages to make themselves felt beyond the bounds of England, beyond the bounds even of English-speaking peoples, in all places and at all times wherever and whenever men have had the will and the power to establish constitutional government.[5] We may surely claim that these large results of this part of Coke's work upon the civilized world of to-day entitles the most English of our English common lawyers to a place among the great jurists of the world.

But of the effect of Coke's work upon our constitutional law, from which these large results have flowed, I must speak more at length in the next chapter.

[1] Cp. Maitland, English Law and the Re[illegible]sance 30—"If there had been a Reception . . . I think that we should have had to rewrite a great deal of history. For example, in the seventeenth century there might have been a struggle between king and Parliament, but it would hardly have been that struggle for the mediæval, the Lancastrian, constitution in which Coke, Selden, and Prynne and other ardent searchers of mouldering records won their right to be known to schoolboys."

[2] Vol. ii 430-434; vol. iv 174, 188-189.

[3] Above 445, 451-454; vol. vi 101-102, 104. [4] Above 195.

[5] Both these points can be illustrated from French legal history; Esmein, History of Continental Criminal Procedure (Continental Legal History Series) at pp. 322-323 (Pt. II. Tit. ii ch. 1 § 5) says—"everywhere upon the continent, in France and elsewhere, the inquisitorial procedure . . . was now established. . . . One European nation however had resisted and escaped the contagion, and was destined later to serve, to a large extent, as a model for legislation of the French Revolution. This was England." In "La règle 'Princeps legibus solutus est' dans Pancien droit public Francais," Essays in Legal History (1913) at p. 214 he says—"La philosophie du XVIII siècle . . . proclamait, comme une règle essentielle de l'État, l'empire absolu et inévitable de la loi. Je ne citerai qu'un passage de Voltaire, qui dans un de ses Dialogues fait ainsi parler un Anglais: 'Ce que je trouve le plus juste c'est *liberté* et *propriété*. . . . Je veux que chacun ait sa prérogative. Je ne connais des lois que celles qui me protègent, et je trouve notre gouvernement le meilleur de la terre parce que chacun y sait ce qu'il a, ce qu'il doit, et ce qu'il peut. Tout est soumis à la loi, à commencer par la royauté et par la religion.' . . . La constitution francaise de 1791 enregistrait la règle nouvelle dans ces termes. . . . 'Il n'y a point en France d'autorité supérieure a celle de la loi. Le roi ne règne que par elle, et ce n'est qu'au nom de la loi qu'il peut exiger l'obéissance.'"

# APPENDIX

## I

## THE OPINION GIVEN BY THE JUDGES IN 1591 AS TO IMPRISONMENTS BY ORDER OF THE COUNCIL

### (1) THE VERSION GIVEN BY THE LANSDOWNE MS. LXVIII. 87

To the right honourable our very good lords, Sir Christopher Hatton, of the honourable order of the Garter knight, Lord Chancellor of England, and Sir William Cicill, of the honourable order of the Garter knight, Lord Burghley, Lord High Treasurer of England.

We, her Majesty's Justices of both Benches and Barons of the Exchequer, do desire your Lordships that by your good means such order may be taken that her Highness' subjects may not be committed or detained in prison by commandment of any nobleman or counsellor against the laws of the realm, to the grievous charges and oppression of her Majesty's said subjects: or else help us to have access to her Majesty to be suitors unto her Highness for the same. For divers have been imprisoned for suing ordinary actions and suits at the Common law until they will leave the same, or against their wills put their matter to order, although sometime it be after judgment and execution.

Item, others have been committed and detained in prison upon such commandment against the law, and upon the Queen's writ in that behalf, no cause sufficient hath been certified or returned.

Item, some of the parties so committed and detained in prison, after they have by the Queen's writ been lawfully discharged in court, have been eftsoons re-committed to prison in secret places and not in common and ordinary known prisons, at the Marshalsea, Fleet, King's Bench, Gatehouse, nor the custody of any sheriff, so as upon complaint made for their delivery the Queen's court cannot learn to whom to award her Majesty's writ, without which justice cannot be done.

Item, divers serjeants of London and officers have been many times committed to prison for lawful executing of her Majesty's writs out of the King's Bench, Common Pleas, and other courts, to their great charges and oppression, whereby they are put in such fear as they dare not execute the Queen's process.

Item, divers have been sent for by pursuivants for private causes, some of them dwelling far distant from London, and compelled to pay to the pursuivants great sums of money against the law, and have been committed to prison till they would release the lawful benefit of their suits, judgments, or executions; for remedy in which behalf we are almost daily called upon to minister justice according to law, whereunto we are bound by our office and oath.

And whereas it pleased your Lordships to will divers of us to set down when a prisoner sent to custody by her Majesty, her council, or some one or two of them, is to be detained in prison and not delivered by her Majesty's courts or Judges:

We think that if any person shall be committed by her Majesty's special commandment or by order from the Council-Board, or for treason touching her Majesty's person, any of which causes being generally returned into any court is good cause for the same court to leave the person committed in custody, but if any person shall be committed for any other cause, then the same ought specially to be returned.

| | |
|---|---|
| C. Wray. | Thos. Geint. |
| Edm. Anderson. | Robt. Clerke. |
| Roger Manwood. | W. Peryam. |
| Fra. Wyndam. | Tho. Walmysley. |
| J. Clenche. | Edward Fenner. |
| Francis Gaudy. | |

*Endorsed.*—9 Junii 1591. A declaration of all the Judges of sundry misusages in committing men to prison without lawful cause.

(2) THE VERSION GIVEN IN ANDERSON'S REPORTS VOL. I. 297-298

Divers persons fuerunt commits a several temps a several prisons sur pleasure, sans bone cause; part de queux esteant amesnes en Bank le Roy, & part en le Commen Bank fuerunt accordant a Ley de terre mises a large & discharge de le imprisonment, pur que ascun grandus fuerunt offend & procure un commandment a les Juges que ils ne ferr issint apres ceo; neint meins les Juges ne surcease mes per advice enter eux ils fesoint certein Articles le tenor de queux ensua, & deliver eux al Seigniors Chancellor & Treasurer & eux subscribe oue touts lour mains: les Articles sont come ensua, scil.

We her Majesties Justices of both Benches, and Barons of the Exchequer desire your Lordships that by some good means some order may be taken, that her Highness Subjects many not be committed nor detained in prison by commandment of any Nobleman or Councellor against the Laws of the Realm, either else to help us to have access to her Majesty to the end to become suiters to her for the same.

For divers have been imprisoned for suing ordinary Actions and Sutes at the common Law until they have been constrained to leave the same against their wills, and put the same to order, albeit Judgment and Execution have been had therein to their great losses and griefs.

For the aide of which persons, her Majesties Writs have sundry times been directed to divers persons having the custody of such persons unlawfully imprisoned, upon which Writs no good or lawful cause of imprisonment hath been returned or certified: whereupon according to the Laws they have been discharged from their imprisonment.

Some of which persons so delivered have been again committed to prison in secret places, and not to any common or ordinary prisons, or lawfull officer, as Sheriff, or other lawfully authorized to have or keep a Goal; so that upon complaint made for their delivery, the Queens Courts cannot learn to whom to direct her Majesties Writs, and by this means Justice cannot be done.

And moreover, divers Officers and Serjeants of London have been many times committed to prison for lawfull executing of her Majesties Writs sued forth of her Majesties Court at Westminster, and thereby her Majesties Subjects and Officers so terrified, as they dare not sue or execute her Majesties Laws, her Writs, and Commandments.

Divers other have been sent for by Pursuivants, and brought to London from their dwellings, and by unlawfull imprisonment have been constrained not onely to withdraw their lawfull Suits, but have also been compelled to pay to the Pursuivants so bringing such persons great sums of mony.



All which upon complaint the Judges are bound by office and oath to relieve and help, by and according to her Majesties Laws.

And where it pleased your Lordships, to will divers of us to set down in what cases a person sent to custody by her Majesty, her Council, some one or two of them are to be detained in prison and not delivered by her Majesties Courts or Judges, We think that if any person be committed by her Majesties commandment from her Person, or by order from the Council-board, or if any one or two of her Council commit one for high treason such persons so in the case before committed may not be delivered by any of her Courts without due tryal by the Law, and Judgment of acquital, had.

Nevertheless the Judges may award the Queens Writs to bring the bodies of such persons before them, and if upon return thereof the causes of their commitment be certified to the Judges as it ought to be, then the Judges in the Cases before ought not to deliver him, but to remand the prisoner to the place from whence he came.

Which cannot conveniently be done unless notice of the cause in generality or else specially be given to the Keeper or Gaoler that shall have the custody of such prisoner.

All the Judges and Barons, &c. did subscribe their names to these Articles, T. 34 Eliz. and deliver one to the Lord Chancellor, and one other to the Lord Treasurer, after which time there did follow more quietness then before in the causes before mentioned.

## II

## LIST OF READINGS IN PRINT OR IN MS.

EDWARD BROOKE, BIBLIOTHECA LEGUM ANGLIÆ (1788) PART II. PP. 191-196

9 *Hen. III.* Magna Carta c. 28. By Sir Robert Brook, *Chief Justice C.P.* 2 *P. and M.* a very ancient and learned reading on this statute, quoted by Lord Coke.[1]

Carta de Foresta. By George Treherne, *Reader at Lincoln's Inn*, temp. H. VIII. By Sir Thomas Hesketh.

3 *Edw. I.* Westm. I. c. 1 de Pace 14 readings. By Thomas Marrow, *Serjeant*,[2] 20 H. VII.

4 *Edw. I.* de extenta Manerii. By Sir Ant. Fitzherbert,[3] *Just. C.P* 15 *Hen. VIII.*

13 *Edw. I.* Westm. II. c. 1 de donis conditionalibus. Sir Thomas Littelton,[4] *Just. C.P.*. 12 *Hen. VII.* [should be 6 Ed. IV.]. Author of the Tenures. c. 4. *In casu quando vir amiserit*, etc.[5]

13 *Edw. I.* Westm. II. c. 12, on Appeals. Richard Littelton,[6] son of Judge Littelton.

[1] Co. Lit. 168, 6.

[2] These readings, which are not extant in print, are quoted as of great authority by the early writers on the office of Justice of peace, particularly by Lambarde. Copies of them are in several of the public libraries, and among the MSS. of Francis Hargrave, Esq.

[3] There are also extant in MS. by Fitzherbert 11 readings on the stat. of Marlebridge, 52 Hen. III. V. *Cat. MSS.* Ang. v II. n. 1947.

[4] Pref. to Coke Litt. and Co. Lit. 19a, 39a.

[5] Quoted Lit. sect. 481. A MS. in an antient hand writing, containing readings upon this and the greater part of the other chapters of the same statute, is in the hands of the compiler hereof.

[6] Pref. to Co. Litt. Daltons Sheriff, 392, 419. Br. Abr. *Appell.* 125. Extant Harl. MSS. n. 1691.

27 *Edw. I.* de finibus levatis. Sir Edward Coke, *Ch. Just.* C.P. 4 *Jac. I.* and *Ch. Just.* K.B. 11 *Jac. I.*
17 *Edw. II.* Prerogativa Regis.[1] Sir Thomas Frowike, *Ch. Just.* C.B. 19 *Hen. VII.*
25 *Edw. III.* c. 2. On Treasons. Robert Holbourne.
27 *Edw. III.* c. 17. Merchant Strangers.[2] By Sir Edward Littleton, *Lord Ch. Just.* C.P. 15 *Car. I.*, *Lord Keeper* 16 *Car. I.*
1 *Ric. II.* c. 9. Parnor de Profits. Justice Martin.[3] Just. C.P. 2 *Hen. VI.*
13 *Ric. II.* Jurisdiction of the Admiralty. Sir Leoline Jenkins, *Judge of the Court of Admiralty*, temp. Car. II.
8 *Hen. VI.* c. 9. Forcible Entries. Thomas Risden, *Reader of the Inner Temple*, 12 *Eliz.* Another of the same name, 10 *Jac. I.*
4 *Hen. VII.* On Fines, 15 Readings,[4] John Denshall, *Serjeant at Law*, 23 *Hen. VIII.*
4 *Hen. VII.* c. 17. On Aids, 11 Readings. By Thomas Audley,[5] who succeeded Sir Thomas More as Lord Chancellor, 24 *Hen. VIII.*
21 *H. VIII.* c. 13. De facultatibus beneficior. Reading at Middle Temple, 2 Aug. 1610. Sir James Whitlock, *Justice of King's Bench*, 22 *Jac. I.* and *Chief Justice of Chester*.[6]
21 H. [VIII.] c. 19. Of Avowries. By Thomas Risden, *Reader of the Inner Temple*, 12 Eliz.
23 H. VIII. c. 5. Of Sewers. John Herne.
27 H. VIII. c. 10. Of Uses. By Sir Francis Bacon, *Sol. Gen.* 5 Jac., *Attorney Gen.* 11 Jac., *Lord Keeper* 14 Jac., *Lord Chan.* 18 Jac.
27 H. VIII. c. 10. Of Jointures. Sir John Brograve.
28 H. VIII. c. 2 On Limitation of Actions. By Robert Brooke.[7]
32 H. VIII. c. 5. On Sewers. Robert Callis.
32 H. VIII. c. 1. On Wills.
34, 35 H. VIII. Explanation of above stat. Sir James Dyer, *Middle Temple.*
34, 35 H. VIII. On Wills. Popham.[8]
35 H. VIII. c. 6. On Trial by Jury. Sir Thomas Williams, Speaker H.C. 5 Eliz.
13 *Eliz.* c. 7. On Bankrupts. John Stone, *Serjeant at Law*, 16 Car. I.
43 Eliz. c. 4. Charitable Uses. Sir Francis Moore, 4 Jac. I. Mid. Temp.
3 *Car.* I. Petition of Right. William Prynne.[9]

Besides those above enumerated on particular statutes, the following are written on general subjects:—

[1] Br. Abr. *Apporcionment* 28; *Garde* 120; *Idiot* 6; *Notice* 27; *Office devant eschetor* 60; *Petition* 41; *Testmoignes* 30; *Travers d'Office* 54; *Villenage* 71; also extant Harl. MSS. n. 1691.

[2] Not printed, quoted by Lord Chief Baron Parker in the case of Omychund v. Barker, 1 Atk. 42. See also 1 Salk. 46.

[3] Not printed, V. Br. Abr. *Feoffment de terre* 19; *Parnor* 4.

[4] V. Cat. MSS. Ang. v. II. n. 1947. The printed copies contain only six readings.

[5] Mentioned in the author's life in Biogr. Britan. and in Fuller's Worthies. A copy of them is among Mr. Hargrave's MSS.

[6] Not printed, quoted in Jacob's Dict. tit. Monkery; mentioned in Append. to Hearne's Curious Discourses and Woods Athen. 490, extant in Ashmol. Mus. Oxf. Catal. MSS. Ang. v. I. n. 7858. A copy of this reading is also among Mr. Hargrave's MSS. and another in the possession of the compiler hereof.

[7] There are also extant Harl. MSS. n. 1692, Brooke's Readings, A.D. 1614, on 43 Eliz. c. 8. Q. if by Sir Rob. Brooke.

[8] Not printed, quoted in Dyer 218b.

[9] Not printed, extant among Mr. Petyt's MSS. in Inner Temple Library, and among Mr. Hargrave's MSS.



Reading on Copyholds, Charles Calthrope.
Reading on Advowsons, Sir John Dodderidge.[1]
Case and Arguments against Sir Ignoramus at Cambridge, in a reading at Staple Inn, by Robert Callis, Serjeant at Law.

Neither of the following appear to be extant in print, but are found frequently quoted in the law-books, without mention of the particular statute of which they respectively treat.

1 Aldsworth's reading. Lincoln's Inn Lect. 38 Eliz.[2]
2 Archer's reading on the laws of the forest.[3]
3 Chiborne's reading, anno. 1 Hen. VIII.[4]
4 Cock's reading.[5]
5 Fitzjames's (Sir John) reading.[6]
6 Gwin's reading. Richard Gwyn, *Reader*, Inner Temple, 4 Jac.[7]
7 Harrison's reading, at Lincoln's Inn, Lent 1632.[8]
8 Herbert's reading. The author was reader at the Inner Temple 12 Car. I.[9]
9 Philips's reading.[10] Q. Francis Philips, reader of the Inner Temple, 13 Car. II.
10 Reading, temp. *Hen. VII.* concerning the Office of Coroner.[11]
11 Reading, temp. *Hen. VII.* by W. N.[12]
12 Reading on Quo Warranto.[13]
13 Reading (S).[14]
14 Thatcher's reading, 15 *Hen. VII.*[15]
15 Whorhod's reading, 35 *Hen. VI.* Q. William Whorwood, *Solicitor Gen.* 27 Hen. VIII., *Attorney Gen.* 32 Hen. VIII.[16]

## III

## SIR MATTHEW HALE'S CRITICISMS ON HOBBES'S DIALOGUE OF THE COMMON LAWS

There are three versions of this tract—the Harleian MS. 711, ff. 418-439, which is here printed, and two copies of it in the British Museum. Francis Hargrave had a copy of it; and J. B. Williams in his "Memories of the life, character and writings of Sir Matthew Hale," published in 1835, tells us at p. 398 that the original "is stated to be" at Cottles, formerly the seat of the Hale family.[17] The original seems now to be lost; but, as Sir F. Pollock says, "Whatever may have now become of the original, it seems quite likely that it was a rough draft, and exhibited a very little better text, if better at

[1] Lecturæ Juridicæ Magist. Dodderidge, 1594, extant in Harl. MSS. n. 5053.

[2] Dyer 355a.

[3] Quoted in Manwood's Forest Law 4 to 59b.

[4] Dalton's Sheriff 386, etc. There is also extant, Harl. MSS. 1692, Chibborne's reading, A.D. 1613, on stat. 33 Hen. VIII.

[5] Ib. tit. Felonie, Burglarie.

[6] Br. Abr. *Apporcionment* 28; *Prerogative le Roi* 134.

[7] Cowel's Dict. verb Common Pleas—Congé d'elire—Court of Requests—Justices in Eyre—and Cat. Harl. MSS. 813 art. 26, where it is observed of this Reading, "It touches much upon the subjection of the church and clergy to the law of the land in several instances."

[8] Quoted in Dyer 200, in Margin and Viner, *Baron and Feme*, A. 16; Ib. C. 6 in notes.

[9] V. 2 Rolls. Abr. 515.

[10] Hargr. Co. Lit. 33a.

[11] Br. Abr. *Appell.* 62; Ib. *Corone* 82.

[12] Br. Abr. *Corone* 181 seq.; Ib. *Sanctuarie* 11.

[13] Br. Abr. *Quo Warranto* 12.

[14] Br. Abr. *Recognizance* 14.

[15] Br. Abr. *Waste* 96; Tr. 15 H. VII. 11, 21.

[16] Br. Abr. *Defeisance* 18; *Discent* 40; *Prescription* 108.

[17] L.Q.R. xxxvii 274.

all, than the British Museum copy."[1] As Hale died in 1675, and Hobbes's Dialogue was first printed in 1682, Hale must have seen it in MS. This, however, raises no difficulty; for, as Sir F. Pollock points out, "down to the early part of the eighteenth century, if not even later, it was a common practice to circulate unpublished works among learned persons for their entertainment or criticism;" and we know that "other works of Hobbes were circulated in this manner."[2] It may be that failing health was the reason why the tract is incomplete.[3] If it had been completed it would probably have been published long ago.[4]

The Harleian MS. which is here printed, contains three tracts[5] by Sir Matthew Hale "from the original in his own hand." This tract is entitled "Reflections by the Lrd. Cheife Justice Hale on Mr. Hobbes his Dialogue of the Lawe." It is, as we have seen, divided into two parts—"In Caput Primum of Laws in Generall and the Law of reason," and "Of Soveraigne Power." In the first part Hale's object is to demonstrate the weakness of a purely analytical and logical criticism of existing laws and political institutions; and in the second part to prove both the inapplicability of Hobbes's doctrine of sovereignty to English institutions, and its political inexpediency. The importance of this tract to historians of English public law, and of English legal and political theory is obvious. It was the question of the whereabouts of the sovereign power in the English state which underlay all the purely constitutional controversies of the seventeenth century. It was the application by Hobbes in his Dialogue of the Common Laws of the new doctrine of sovereignty to the laws of England which resulted in the first comprehensive and reasoned criticism of those laws. In this tract of Hale's we can see how this new theory of sovereignty, and how this criticism of the laws of England, struck the mind of a man of moderate political opinions, who was one of the greatest lawyers of his time, and the only historian of English law who can be put on a level with Maitland. Hobbes, as we all know, was the spiritual father of Austin. It is not surprising therefore that, just as Austin's speculations attracted the criticisms of Maine and the new school of historical lawyers which arose in the second half of the nineteenth century, so Hobbes's speculations attracted the criticisms of one of that band of lawyers and historians, of whose works I have given some account in this volume.[6]

## REFLECTIONS BY THE LRD. CHEIFE JUSTICE HALE ON MR. HOBBES HIS DIALOGUE OF THE LAWE[7]

### *In Caput Primum of Laws in Generall and the Law of reason*

When we speake of reason we are to consider itt under these severall motions.[8]

1. It may be justly taken for that Subjective reason that is in thinges that are to be known or understood, wch consists in the Congruity, Connexion and fitt Dependence of one thing upon another. Such a reason as this may be

[1] L.Q.R. xxxvii 274.

[2] Ibid; note also that it is referred to in the list of his works as a tract "Upon Mr. Hobbes his Manuscript," Burnet, Life of Hale 193.

[3] Ibid.

[4] It was first printed in 1921, ibid.

[5] The History and Analysis of the Common Law of England; of the Alteration Amendment or Reformation of the Laws of England; and the tract here printed. The first two tracts are well known; they will be described in vol. vi c. 8.

[6] Above 402-412.

[7] The numbers of the pages of this tract are marked in the body of the text. A space has been left when a word or words are obviously missing. There are no spaces left in the MS. The notes marked F.P. contain suggestions made by Sir Frederick Pollock; the other notes are inserted by myself.

[8] *Quære* "notions."—F.P.



found in thinges that are destitute of the faculty of Reason and is or may be antecedent to any Exercise of any humane -2- Reasonble facultie: thus the Connexion of Effects to their Causes, the Consequences of Propertyes to their Formes or Essences, the Exertions of Acts by their Powers, the ordination and disposition of Naturall thinges in their severall places, and Orders: the Connaturall tendencyes and motions of thinges in Nature to their Preservation and Conveniences have a reasonableness that is a Decorum, Congruitie, and Conseqution though they were noe man in the world to take notice of itt. The proportion between Lines and Superficies, and figures, and of their various Coincidences and texture, and the Reasonableness thereof in the Mathematicks would be antecedent to any Operation of a humane understanding uppon them, wch rather findes its Conclusions in them, then makes them. And in Moralls though the objects thereof are more obscure, and not soe open to a distinct and Cleare Discoverie, yett there is a Certaine Reasonableness and Congruitie, and Intrinsick Connexion and Consequence of one thing from an other antecedent to any Artificiall Systeme of Moralls or Institution of Laws.

-3- 2. Itt is taken for that Faculty of reasonable Nature whereby itt mooves it Selfe to ye attainmt of thinges to be knowne, and then it is called Judgemt, or in thinges to be done, and then itt may be called wisedome, Prudence, or Skill. And although in Some thinges there is that meere vicinitie between this faculty and ye object, that it acts quasi per saltum, as the bodyly Eye sees, yett for ye most part the Exertions of this Faculty is Graduall, Discursive, and att least by an internall Deduceing of one thing from another, or an illation or Inferring of one thing upon another, wch is called Ratiocination. And thus reason as it is a Facultie cōmon to all reasonable Creatures is the Cōmon Engine or Instrumt whereby all kinds of Knowledges or Arts are acquired. It is ye Same Facultie of Reason that Serves the Naturalist, the Phisician, the Lawyer, the Mathematician, the Mechanique, ye Plowman in all their severall waies and prosecutions.

But although this Cōmon Facultie be Cōmon to all mankind, yett it is easily observable, that in severall men there are various degrees of Quickness, Activitie and perfection -4- in this reasoning facultie, wch may partly proceed from the various temperamts of their spirritts and humours, or from the various Exercise Employmt and excitation of this reasoning facultie in them. And not only Soe, but it is most evident to any observing man, that very often times the Edge, the Direction, the Apex Rationis [is (*sic*)] as I may call it in severall men are directed Severall waies. That man's reason that is dextrous and ready in Phisick is not Suited for Politiques, and another mans reason that renders him apt and quick in the Mathematicks doth not Suite to ye Knowledge of Phisique, yea sometimes men that could not give a tollerable acct of ten wordes of Sence [*sic*] yett straingely dexterous in Mechaniques and Sometimes in Musick.

Tully that was an excellent Orator, and a good Moralist, was but an ordinary Statesman and a worse Poett. And tho possibly Some men may be of Soe happy a Reason, that itt may bid faire for any kind of object, yett it is rare, & Cōmonly those that p'tend to an universall Knowledge are but Superficiall and Seldome pierce deepe into any thing.

-5- 3rdly Itt is taken complexedly when the reasonable facultie is in Conjunction wth the reasonable Subject, and habituated to it by Use and Exercise, and it is this kind of reason or reason thus taken that Denominates a Man a Mathematician, a Philosopher, a Politician, a Phisician, a Lawyer; yea that renders men excellent in their prticular Acts[1] as a good Engineer, a good

[1] This should probably be "Arts."—F.P.

Watchmaker, a good Smith, a good Surgeon—all wch consists in the application of the Facultie of reason to the particular Subject, the direction of it in a particular Channell and by particular Methods, whence it comes to pass that as the same naturall Motion and tendencie of water, according to ye various applications and directions in one place waters a Meadow, in another place drives a Mill, in another place lifts up a hammer, or carryes a flote, or as the same qualitie of Discent in a weight according to ye variety of its application makes ye Clock to Strike, the Index of the watch to shew ye houre, or ye Jack to turn ye Spitt, Soe the Same Facultie of reason variously applyed and directed -6- renders this man a Mathematician, a Phisician, a Lawyer an Artificer, according as the reasoning Faculty is directed or applied & habituated by use and Exercise to ye severall objects thereof. And upon this Acct it comes to pass that tho' two, or more men of ye Same perfection of the reasoning Facultie that have yett variously Exercised and applyed that Cōmon Facultie to their Severall objects, they are not Equally to Expect an equall aptitude and perfection in each othrs Science or art. If one man habituated and applyed his reason to ye Science of Phisique and another man habituated and applyed his reason in Mathematicall Sciences, this shall not be so good a Phisician as ye other, nor the other, So good a Mathematician as this. And therefore tho' the Mathematican cursorily runns over the Titles of the bookes of Gallen and Hippocrates, or ye Phisician runns over ye titles of the Theorems and Conclusions of Euclid, and Archimides, or if a Man that pretends himselfe and really be well Exercised in Natural Philosophy Shall run over the titles or Indexes of ye digest, or Code, the first -7- shall be but a weake Phisician the second a weake Mathematician, and the third a weake Civilian, though possibly there might be a paritie in ye perfection or Degree of their reasoning Facultie abstracted from its habituation to its object. Of all Kind of Subjects where about ye reasoning Facultie is conversant, there is none of So greate a difficulty for the Faculty of reason to guide it Selfe and come to any Steddiness as that of Laws, for the regulation and Ordering of Civill Societies and for the measureing of right and wrong, when it comes to particulars. And therefore it is not possible for men to come to the Same Certainty, evidence and Demonstration touching them as may be expected in Mathematicall Sciences, and they that please themselves wth a perswasion that they can wth as much evidence and Congruitie make out an unerring Systeme of Laws and Politiques equally applicable to all States and Occasions, as Euclide demonstrates his Conclusions, deceive themselves wth Notions wch prove ineffectual, when they come to particulr application. And the reasons of this difficulty are evident vizt.[1]

-8- 1. In Moralls and Especially with relation to Lawes for a Cōmunitie, tho the Cōmon Notion of Just and fitt are cōmon to all men of reason, yett when Persons come to particular application of those Cōmon Notions to

[1] Hale has expressed the same ideas in somewhat similar words in his Preface to Rolle's Abridgment; cp. Burke, Reflections on the French Revolution '91-92. "The nature of man is intricate; the objects of society are of the greatest possible complexity; and therefore no simple disposition or direction of power can be suitable either to man's nature, or to the quality of his affairs . . . The pretended rights of these theorists are all in extremes; and in proportion as they are metaphysically true, they are morally and politically false. The rights of men are in a sort of *middle*, incapable of definition, but not impossible to be discerned. The rights of men in governments are their advantages; and there are often in balances between differences of good; in compromises sometimes between good and evil, and sometimes between evil and evil. Political reason is a computing principle: adding, subtracting, multiplying, and dividing, morally and not metaphysically or mathematically, true moral denominations."



particular Instances and occasions wee shall rarely find a Cōmon Consent or agreemt between men tho' of greate reason, and that reason Improved by greate Study and Learning, wittness the greate disagreemt between Plato and Aristotle Men of greate reason in the frameing of their Laws and Cōmonwealth, the greate difference in most of the States and Kingdomes in ye world in their Laws administrations and measures of right and wrong, when they come to particulars. And lett any man but Examine the weightiness of those men that p'tend to be ye greate masters of Reason and possibly they may be excellent men: yett no persons differ more than they touching things of this nature. And tho' they perchance have this happiness to Shake and weaken one the othrs Principles or Conclusions, yett when they Sett up their own positions they are weake and generally displeaseing.

-9- And upon this Accot it is that when men of observation and Experience in Humane affaires and Conversation between man and man make many times good Judges, yett for the most part those men that have greate reason and Learneing wch they gather up of Casuists, Schoolmen, Morall Philosophers, and Treatises touching Moralls in the Theory, that So are in high Speculations and abstract Notions touching Justice and Right, and as they differ Extreamely among themselves when they come to particular applications, So are most Cōmonly the worst Judges that can be, because they are transported from the Ordinary Measures of right and wrong by their over fine Speculacons Theoryes and distinctions above the Cōmon Staple of humane Conversations. And this Instability, uncertaintie and varietie in ye Judgemts and opinions of Men touching right and wrong when they come to particulars; and to avoid that greate uncertainty in the application of reason by particular persons to particular Instances; and to ye end that Men might understand by what rule and measure to live & possess; and might not be under the unknowne arbitrary, uncertaine Judgemt of the uncertaine -10- reason of particular Persons, hath been ye prime reason, that the wiser Sort of the world have in all ages agreed upon Some certaine Laws and rules and methods of administration of Cōmon Justice, and these to be as particular and Certaine as could be well thought of. By this meanes they gained these advantages: (1) they avoided the greate Instabilitie of the judgemts and reasons of Judges and gained Somewhat of Certainety wch might be knowne to them that were to Judge and to be Judged. (2) they hereby avoided that greate oppertunitie that Judges had, when they had noe other rule for their Judgmt but their own reason, to be Corrupt and partiall. (3) They in a greate measure avoided that jangling and Contradiction that would happen uppon the unstable reason of Men when they once came to particular Decisions.

Though a certaine and determinate Law may have some mischiefes in relation to particulars, wch cannot all by any humane Prudence att first be foreseen and provided for, yett . . . is p'ferrable before that Arbitrary and uncertaine rule wch Men miscall ye Law of reason. -11- Yet certain it is that that Law is best framed that at once hath Certainty, and yett induceth as few particular mischiefs as may be. And hence it is, that it is a thing of greatest difficulty, So to Contrive and Order any Lawe that while it remedyes or provides agst one Inconvenience, it introduceth not a worse or an equall. A Man that hath a prospect at once, or [*sic*] a few thinges may with ease enough fitt a Lawe to that, or those thinges. Qui ad pauca respicit facile pronuntiat. But ye texture of Humane affaires is not unlike the Texture of a diseased bodey labouring under Maladies, it may be of so various natures that such Phisique as may be proper for the Cure of one of the maladies may be destructive in relation to ye other, and ye Cure of one disease may be the death of the patient.

And this . . . the Difficultie of makeing, interpreting and applying Laws

because 1. Itt requires a very large prospect of all the most considerable emergencies that may happen not only in that wch is intended to be remedyed, but in those other accidentall, Consequentiall or Collateral -12- thinges that may Emerge uppon the Remedy propounded. 2dly a greate and Experienced Judgemt to weigh and Consider whether the Convenience of the Law propounded may considerably preponderate the inconvenience that it will occasion. 3dly a greate Judgemt and Skill So to apply the remedy that it may . . . with the least inconvenience that may be.

The Inconvenience of an Arbitrary is intollerable, and therefore a certaine Lawe, though accompanied wth some mischiefe, is preferrable before itt. But it is not possible for any humane thing to be wholly perfect.

A certaine Law hath this inconvenience attending itt that Sometimes Some persons or causes may Suffer by the rigour of a certaine Law, yett Infinite more must Suffer by the inconvenience of an Arbitrary and uncertaine Law. And the same difficultie wch in this respect happens in makeing Laws must necessarily happen many -13- times in the expounding of them, when there is room or Latitude for Exposition. The Expounder must looke further than the present Instance, and whether such an Exposition may not introduce a greater inconvenience then it remedyes.

3. A Third thing that renders . . . the true determination of Morall Actions and the application of remedyes to them is this that every Morall Action is or may be diversified from another by Circumstances which are of soe greate an Influence into the true nature and determination of Morall Actions that they very frequently specifically difference Actions that are materially the Same, and give such Allayes and abatemts or advances and improvemts to them that Scarce two Morall Actions in the world are every way commensurate. And these Circumstances are Soe various and their Influx into Morall Actions so different and Soe difficult to be discerned, or adequately estimated, that the makeing of Laws -14- toucheing them is very difficult. There are many things especially in Laws and Governmts yt mediately, Remotely and Consequentially are reasonable to be approoved, though the reason of the party doth not presently or imediately & distinctly See its reasonableness. For instance, itt is reasonable for me to preferre a Law made by a hundred or two hundrd persons of age wisdome Experience and Interest before a Law excogitated by my Selfe yt [*sic*] it may be a Simple unexperienced younge man, though I discerne better ye reason of that Law that I have thought of then ye reason of the Law of those wise men.

Againe it is a reason for me to preferre a Law by wch a Kingdome hath been happily governed four or five hundrd yeares then to adventure the happiness and Peace of a Kingdome upon Some new Theory of my owne tho' I am better acquainted wth the reasonableness of my owne theory then wth that Law. Againe I have reason to assure myselfe that Long Experience makes -15- more discoveries touching conveniences or Inconveniences of Laws then is possible for the wisest Councill of Men att first to foresee. And that those amendmts and Supplemts that through the various Experiences of wise and knowing men have been applyed to any Law must needs be better suited to the Convenience of Laws, then the best Invention of the most pregnant witts not ayded by Such a Series and tract of Experience.[1]

[1] Cp. Burke, Reflections on the French Revolution 90—"The science of government being therefore so practical in itself, and intended for such practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be, it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again, without having models and patterns of approved utility before his eyes."



All these thinges are reasonable, the particular reason of the Laws & Supplemts themselves perchance are not obvious to the most Subtill Witts or Reason.

And this adds to ye difficultie of a present fathomeing of the reason of Laws, because they are the Production of long and Iterated Experience wch, tho' itt be commonly called the mistriss of Fooles, yett certainly itt is the wisest Expedient among mankind, and discovers those defects and Supplys wch no witt of Man coud either at once foresee or aptly remedye. 5. The last reason touching the Inevidence of Laws -16- already made att least in all thinges to every mans reason is this because Laws are certaine Institutions, and tho' perchanse att first the makers of them Saw reason to pitch upon this Institution rather then another, yett in thinges thus Settled it is not necessary that the reasons of the Institution should be evident unto us. It is Sufficient that they are Instituted Laws that give a Certainty to us, and it is reasonable for us to observe them though the perticuler reason of the Institution appeare not. And tis a foolish and unreasonable thing for any to find fault wth an Institution because he thinkes he could have made a better or expect a Mathematicall Demonstration to evince the reasonableness of an Institution or the Selfe Evidence thereof. Itt is a part of the Law of England that all the Landes descend to the eldest Sonne without a particular Custome altering itt. That a Freehold passeth not without Livery and Seisin, or Attornemt by an Act in Paijs, But where Statutes -17- have altered, that an Estate made by Deed to a Man for ever passeth only for life without the word Heires and Infinite more of this kind. Now if any the most refined Braine under heaven would goe about to Enquire by Speculation, or by reading of Plato or Aristotle, or by Considering the Laws of the Jewes, or other Nations, to find out how Landes descend in England, or how Estates are there transferred, or transmitted among us, he wou'd lose his Labour, and Spend his Notions in vaine, till he acquainted himselfe with the Lawes of England, and the reason is because they are Institutions introduced by the will and Consent of others implicitely by Custome and usage, or Explicitely by written Laws or Acts of Parlemt.

And upon all this that hath been said it appeares that men are not borne Cōmon Lawyers, neither can the bare Exerciss of the Faculty of Reason give a man a Sufficient Knowledge of it, but it must be gained by the habituateing and -18- accustomeing and Exerciseing that Faculty by readeing, Study and observation to give a Man a compleate Knowledge thereof. And although a Man that hath long and Industriously Exercised himselfe in that Study cannot p'tend either to Infallibilitie in his Judgemt or to a full attainemt of all that is attaineable toucheing the Laws of England, yett he will be much better fitted for right Judgemt therein, then he that hath no other Stock to trade upon then the bare Exercise of his Faculty of reason, or that hath only taken the paines to read over the Titles of the Statutes or Indexes or Repertoryes of some Law bookes.

Itt were ridiculous to expect that a Man that hath either onely the advantage of his owne materiall Ingenij,[1] or hath spent a Month in readeing Some of the Rudimts of Geometrie Should be as good a Master in the Mathematicks as he that hath made it the Study of his life, and yett it is apparent that the Positions and Conclusions in the Mathematicks have more Evidence in -19- them, and are more Naturally Seated in the minde then Institutions of Laws, wch in a greate measure depend upon the Consent and appointmt of the first Institutrs. Such persons therefore that have had their Education in the Study of the

[1] I suspect that whatever Hale originally wrote was a compendium standing for the three last syllables of "ingenuity"; and "natural" would make better sense than "material."—F.P.

English Laws have these Considerable advantages to render them fitter Judges and Interpretrs of the Lawes of this Kingdome then any other whose Studyes and Education have intirely or Principally applyed to the Study of Philosophy or Mathematiques or other Studyes.

1st. Itt is not impossible but that at least some of those that have applyed themselves to the Studys of the Laws have as farr a measure of Naturall reason, as those that have adicted themselves to Philosophy or other Studyes, and possibly woud have proved as good Proficients in them had they applyed and habituated their reason to those Studyes.

2dly. If Men of Parity of reason and Intellectualls have gotten the advantage of others that in Naturall Capacities have been their -20- Equalls by reason of the advantage they have had by their Education in this or that kind of Learneing then certainely, considering how much the nature of the Science of the Law requires much more assiduity and application to itt, then other Studyes,[1] that persons of Equall parts that hath habituated his reason to the Study of the Law must needs have so much the greater advantage in his Knowledge of itt, above others that have not made itt their business, by how much the more the very nature kind and Condicōn of that Science requires more Study and application then the Studyes of other Sciences.

3. Itt is one of the thinges of greatest moment in the profession of the Cōmon Law to keepe as neare as may be to the Certainty of the Law and the Consonance of it to it Selfe, that one age and one Tribunall may Speake the Same thinges and Carry on the Same thred of the Law in one Uniforme Rule as neare as is possible; for otherwise that wch all places and ages have Contended for in Laws namely -21- Certainty and to avoid Arbitrariness and that Extravagance that would fall out, if the reasons of Judges and advocates were not kept in their traces wold in halfe an age be lost.

And this Conservation of Laws within their boundes and Limitts could never be, unless men be well informed by Studyes and readeing what were the Judgemts and Resolutions, and Decisions and Interpretations of former ages, and of other Courts and Tribunalls, and therebye to keepe a Consonance and Consistence of the Law to it Selfe, wch wold never be done without much readeing, and observation and Study.

4. As to Exposition of Acts of Parlemt and written Laws certainly Hee that hath been Educated in the Study of the Law hath a greate advantage over those that have been otherwise Excercised, lett them p'tend to or be Masters of never soe much Reason. For first they have not only the Preamble and body and provisoes of the Acts of Parlemt before them, but they have a Cleerer Evidence -22- of what the Practise or mischief was before which possibly is not soe obvious without readeing especially if it be an Ancient Act.

2. They have the oppertunitie of the Knowledge of the Expositions made by Judges of former times wch cannot be Soe well knowne to others.

3. They have within their view and Knowledge the Expositions of other Acts of Parlemt that either have the like Clauses, or Analogye of Reasons, wch are great guides and helpes in Exposition of Laws, wch they that have the naked use of their own faculties without the help of Studye and Education are destitute of.

*Of Soveraigne Power*

The Modifications of Governmt are various both in their kindes formes and Degrees—Some Monarchicall Aristocricall, Some Democritall and some

[1] The apodosis of the sentence begins with "then certainely" three lines above, and the operative part of it here. I think the only emendation required is to read "person" for "persons."—F.P.



mixt of all, and those mixtures are or may be Infinitely various. In some Constitutions one part of the Soveraigne Power is in one pt of the Governmt an other part in another. -23- These Modifications of Governmt are made in Severall manners.

1. By the Originall Institution of the Governmt when Settled at first by the Consent of the Governrs and Governed, but this is difficult to be found in Ancient Governmts, first because the Originall Instrumt of that Institution is hardly to be found and 2dly because in process of time new occasions Emergencies, accidents and Capitulacōns doe necessarily occasion alterations from the first Institution.

2. By longe custome and usage wch carries in it Selfe a facile Consent of the Governrs and Governed, or is att least an Evidence or Interpretation of the Originall Institution of the nature of the Governmt or of the initall part between the Governrs & Governmt.

3. By Victory or Conquest wch tho' when it is plenary & Universall, it acquires an absolute Dominion or Sovereignty in the Victor, yett Such a Conquest is rare, but cōmonly it ends in Dedition & Capitulation between ye Conquerr & Conquered -24- and then the Pacts or Capitulacōns uppon Such Dedition may abridge or Modifie the Extent of that Sovereignty.

And 4thly by these Concessions and Mutuall Agreemt between the Governrs and Governed after the Primitive Institution of the Governmt whereby it often falls out that the Sovereignty of the Governr is variously Modified according to the Tenor and purport of such Pacts and Concessions Subsequent to the Institution of the Governmt. They that thinke King William the first gott this Kingdome by Such a right of Conquest as abrogated all former rights of Governmt or gott such a Dominion over this Kingdome as absolute Conquerrs obtaine are very mistaken.[1] For 1. the Clayme of King William was not by right of Conquest, but of Succession to King Edward and uppon that accōt indeed he Conquered Harold that was an Usurper. But he conquered not England, but Succeeded in those rights that King Edward had, and left. It was Victoria in Regem but not in Populum, and hence -25- it was that although the rough Dispensations of Warr brought Some hardshipps upon some particuler persons especially Such as tooke part wth Harold, yett there was noe generall alterations of Laws or Properties or Freeholds of English men, for men recover'd their Possessions after the Victory of King Wm. uppon the Seisin their [*sic.*] or their Ancestors had in the time of King Edward by those Processes that were in use before that Victory.

2. But if the Intention of the Claime of King William had been by way of absolute Conquest (as most clearly it was not) yett the full and Plenary Complemt of his acquest was not without Pact and Dedition, in wch the Laws of King Edward were not only granted but granted upon Claime and Capitulation & Confirmed wth all imaginable Solemnitie, and itt was this wch gave the full Establishmt and Settlemt of the Throne of King William.

3dly Besides all this there were from time to time both in the time of King William 1, King William the 2d King Henry 1. and all those that Succeeded them Concession not only of the Laws of King -26- Edward but of all those liberties and Rights wch belong to English men as free Subjects of the Kinges of England.

There is a threefold effect of the Lawes of this or any other Kingdome.

1. Potestas Coerciva. This extends to all the King's Subjects, but doth not extend to the King, he is not under the Coercive Power of the Lawes.

2. Potestas Directiva, and this oblidges the King and wee need not goe

[1] This was a question in which Hale was much interested, and upon which he wrote at some length in Chap. V. of his History of the Common Law.

farther for Evidence thereof then that Solemn Oath wch he takes at his Coronation, the Iterated Confirmation of the greate Charter and those other Laws and Statutes that Concerne the Liberties of his Subjects.

3. Potestas Irritans, and thus the Laws also in many cases bindes ye Kinges Acts, and make them void if they are agt Lawe. As for Instance the Law Saith that no Grants of Landes under other Seale then the great Seale is good. That grants of Monopolies are void, and the like. The Lawe makes such grants void and the Subjects the Instrumts acting by them to such punishmts as if there were noe such grants. No good Subject that understands what he Sayes can make any Question where the -27- Soveraigne Power of this Kingdome resides. The Laws of the Land and the Oath of Supremacy teach us, that the King is the only Supreame Governour of this Realme, and as Incident to that Supreame Power he hath among othrs these greate Powers of Sovereignty.

1. He hath the only power of makeing Peace and Declareing Warr.

2. He hath alone the Power of giveing the vallue and Legitimation to Coyne.

3. He alone hath the Power of Pardoning the Punishmts of Publique offences.

4. From him Originally is derived all Jurisdiction for the Administration of the Cõmon Justice of the Kingdom whether Civill or Ecclesiasticall, whether Ordinary or Delegate.

5. In him alone is the Power of the Militia of this Kingdome, and the raiseing of Forces both by Land and Sea.

6. In him resides the Power of makeing Lawes. The Laws are his Laws enacted by him.

These are the greate Jura Summi Imperij that the Laws of this Kingdome have fixed in the Crown of England, Butt yett there are certaine Qualifications of these Powers especially of the two latter vizt

-28- 1. Though the only Power of the Militia be in the King and him alone yett it hath these two Qualifications.

(1) That noe Subject can by vertue of that Power be inforced to goe out of the Kingdome vid: Stts 1 Ed. 3 Cap. 5,[1] 13 Car. 2 Cap. 2.[2]

(2) That noe ayd or Cõmon Charge can be imposed for the raiseinge or Payeing or furnishing of Soldiers Shipping or other Cõmon Charge without Consent of Parliamt Stt 25 Ed. 1. Cap. 6,[3] 34 Ed. 1. Cap. 1[4] 1 Ed. 3 Cap. 6.[5] The Petition of Right 3 Car. 1. Cap. 1. Noe not in case of Cõmon necessity 17 Car. 1. Cap. 14.[6] So adjudged and declared by the King wth the advise and assent of Lordes and Cõmons in Parliamt, wch is a Judgemt of the greatest weight that can be.

2. Though the Legislative Power be in the King, So that none but he can make Laws oblidgeing the Subjects of this Realme, yett there is a Certaine Solemnitie and Qualification of that Power, namely with the advice and assent of the 2 houses of Parlemt, wthout which no Law can be made. And therefore Proclamations cannot make a Law. Itt is true they may declare and Publish Laws already made & may -29- Serve those Powers wch Lodged in the Kings Person; as to Proclayme Coyne, Peace, Warr, and in times of Publique hostility may prohibite Supply of Enemies wth assistances for Warr, and Some thinges of that nature.

[1] 1 Edw. III. st. 2 c. 5.
[2] 13 & 14 Car. II. c. 3 s. 32.
[3] Confirmatio cartarum, c. 6.
[4] Probably this refers to the apocryphal statute De Tallagio non concedendo, which was then generally believed to be authentic; Hale cites it again in this tract at pp. 34, 37.
[5] 1 Edw. III. st. 2 c. 6.
[6] 16 Car. I. c. 14.



Yett generally the Kings Proclamation cannot make a Law, but Laws are to be made in that Solemnitie and wth the advice of Parlemt tho' these thinges be unquestionably true yett there are certaine Speculators that take upon them to Correct all the Governmts in the world and to govern them by Certaine Notions and Fancies of their owne, and are transported with soe great Confidence and opinion of them that they thinke all States and Kingdomes and Governmts must presently be Conforme to them.

And these are Some of the Notions they Vent.

That there can be noe Qualifications or Modifications of the Power of a Soveraigne Prince but that he may make, Repeale & alter what Laws he please, impose what Taxes he pleases, Derogate from his Subjects propertie how and when he please.

-30- That he alone is the Judge of all publique dangers and may appoint Such remedyes as he please and impose what Charges he thinkes fitt in Order thereunto.

Those wild Propositions are

1. Utterly falce. 2. agst all Naturall Justice. 3. Pernicious to the Governm. 4. Destructive to the Cõmon good and safety of the Governmt. 5thly Without any Shaddow of Law or reason to Support them.

1. They are utterly false, in thinges of this Nature the best measures of Truth or Falsehood are not imaginary Notions or Reasons att large, but the Laws and Customes of this Kingdome wch have determined Reasons att large and bound itt up within the boundes of Such Lawes and Usages.

Itt is certain that the King without the Consent of the Lordes and Cõmons in Parlemt neithr by Proclamation nor by Ordinance, Act of Council or Ordinance cannot make a bindeing Law; and this is so known a truth that itt needes noe Instances to confirme itt But some I shall give and those not of a Cõmon Nature -31- but Such wch have been So declared by ye King himselfe in his Court of Parliamt.

A Restitution in Blood cannot be made but by Act of Parliamt and therefore a speciall Act was made H. 8. to enable the King to doe itt by Letters Patents.[1] Stt 31 H. 8. Cap. 8,[2] was Specially made to Enable the King by the advice of his Councell to Prohibite certaine thinges under Penalties and the Stt of 34 H. 8. Cap. 23 for ye putting them in Execution. But this Power lasted not long both being Repealed by the Stt of 1 Ed. 6 Cap. 12,[3] and therefore altho' the King and Lordes assent to a Law it bindes not, unless the Cõmons also assent. And this is determined by the Judgemt of the King in Parliamt. But Rot Parliamenti 2 H. 5. Sts 2. Num. 20. 10[4] from henceforth nothing can be enacted att the Petition of the Cõmons contrary to their askeing whereby they should be bound without their assent & to the Same purpose are very many Instances Rot. Parl. 6 Richard 2. pt. 1. N. 52.[5]

2. And as he cannot make a Law without Consent of Parliamt, Soe neither can he Repeale a Law without the like Consent. -32- This is a most knowne truth yett Some Instances Shall be given wherein the King himselfe hath in Effect concurred in such Declaration 26 H. 8. Cap. 10 a Speciall Act of Parliament Enabling the King by Proclamacõn to repeale all Lawes toucheing prohibited goodes made after 20 or 21 H. 8 wch needed not if the King might repeale wthout an Act enabling him by Act of Parlemt 34 H. 8. Cap. 26.[6] A Speciall Clause to enable King H. 8 to Repeale and alter the Constitution of that Statute.

This Clause in truth dyed wth H. 8. yett because it was a Clause of greate

[1] 14 & 15 Hen. VIII. c. 21.
[2] The Statute of Proclamations.
[3] 1 Edw. VI. c. 12 s. 4.
[4] R.P. iv 22.
[5] This should be nó. 53; R.P. iii 141.
[6] 34 & 35 Hen. VIII. c. 26 s. 59.

importance it was repealed by the Statute 21 Jacobi. Cap. 10 wch Power and Repeale had Signified nothing if the King might Repeale these Lawes without the help of an Act of Parliament Enabling him. The Statute of 1 Ed. 6. Cap. 11 gave power to that King and all the issues of the bodey of H. 8 to whome ye Crown shall come &c and by these Lres Patents to Repeale all Acts of Parliemt assented to by them before their age of 24 yeares.

-33- Itt is true that in the last Printed booke of Statutes there is a formall revocation made by the King by the advice of his Councell by Proclamacōn of a Statute made the same yeare wch Especially concerned Exclusion of Tryall of Peeres, other then in Parlemt, wch possibly might give some Countenance to kinde [*sic*] of Revocations of Statutes, but the matter being truly understood doth not only not Countenance any Such Conclusion but plainly Evidence ye Contrary.

For 1, in very truth there was never any full Consent of the King to that Act, nay so farr it was agst his will that the Chancellor, Trearer, and Judges in open Parliamt protested agst it, as Contrary to Law as appeares by the Parlemt Roll 15 E. 3. N. 26. 42.[1]

Secondly the King rested not upon this Repeale by Proclamation, But in the next Parliamt vide Rot. parl. 17 [2] E. 3. 23 [3] a Speciall repeale passed by Act of the entire Parliamt of 15 E. 3 wth Direction that for Such thinges as were usefully passed in that Parlemt -34- a new Law should be penned and passed in this Parlemt. So that the Repeale by Proclamation was not thought then Effectuall without an Act of Parlemt of Repeale.

3. As to the Kinges Judgeing of publique dangers and imposeing of Assessmt or Charges in Order thereunto Those that will not believe the Statute de Talliagio non Concedendo doth not Extend to Such a Case or thinke that it is under a tacite condition to be repealed when the King thinkes Expedient, Lett them Consult the Judgemt of the Kings themselves in the Petition of Right 3. Caroli primi, and in the Act for the reversall of the Judgemt given in the Case of Shipp money 17 Caroli primi Cap. 14.[4] where the King by the advice and assent of the Lordes and Cōmons doth not only Enact but declare that that Judgmt was agst the Laws and Statutes of the Realme, the Right of Property and Liberty of the Subject, former Resolucōns of Parlemt and the Petition of Right wch is a Judgemt of ye highest and most Solemn Nature -35- that possibly can be, and yett the Judgemt in the Case of Ship money was bottomed upon a Supposition of necessitie and So declared by the King.

And as to the Case of the Kinges Power in Relation to Acts of Parliamt.

1. Itt is true as to offences agst Acts of Parlemt already Cōmitted where His Matie is Interessed in the Penaltie the King may unquestionably pardon.

2dly In Some Cases where the Interest of the Subject is not imediately concerned, He may as to particular Persons and Cases by a Non obstante, Dispence with the breach of a penall Law.

3dly But where the Subjects Interest is imediately Concerned as in the Case of Extending the Admirall Jurisdiction he cannot dispence wth a Non obstante, But in noe case can the King wthout an Act of Parlemt Repeale an Act of Parlemt whether Penall or other.

2. As to the Second these Petitions [*sic*] are agst Naturall Justice and Equitie, for Certainly Kinges as well as others are bound to keepe their faith and Promises.

-36- And as it is So much the more oblidgeing when Such Pacts and Concessions are not purely gratuitous, as Some kinds of grants are, But Such as are made uppon Mutuall Contract, Stipulations, and thus for the most part

[1] R.P. ii 131.
[2] Altered in the MS. from 15.
[3] R.P. ii 139.
[4] 16 Car. I. c. 14.



are all Acts of Parlemt and Parliamentary Concessions wherein the Subject grants Some thinges to ye King, as Aydes, Supplyes, Subsidies, Tenths, or 15ths and ye King at their Request grants them Laws and Liberties. And thus the greate Charter and the Charter of the Forrest, and the most of the Parliamentary grants were had uppon a kind of Reciprocall Contract & Stipulacōn between the King and his Subjects. But this is not all, most of the important grants in Parlemt of Liberties to the People were not So much new grants of new Liberties but Restitucōns of those very Liberties wch by the Primitive and Radicall Constitution of the English Governmt were of Right belonging to them. Such were the grants of King William of the Laws of -37- Edward the Confessor, The grant of the greate Charters by King John, Henry 3. Edward 1st the Statutes de Tallagio non concedendo & divers others wch were the Originall Rights and Liberties of the Subject. And we have as greate reason to Conclude them to be parts of the Originall and Primitive Institution of the English Governmt by their long usage & frequent Concessions & Confirmacōns of Princes in Soe long and Continued Series of time, as if an Authentique Instrumt of the first Articles of the English Governmt were Extant.

And as the obligation of Naturall Justice bindes Princes and Governors as well as oths to stand to their Pacts and agreemts wth their People, So there is Superadded to that obligation the greate Solemnitie of the Oath wch he takes at his Coronation to observe & keepe those Laws and Liberties. And tho' it is true that the Kinges Person is Sacred, and not under any Externall Coertion, nor to be arraigned by his Subjects for the violation of that Sacred Oath yett no man can make -38- a Question whether he be not in the Sight of God and by the bond of Naturall Justice oblidged to keepe itt.

3. These Positions are the most Pernicious and Dangerous to the Governmt, and generally where yett such Sycophants pretend to gratifie by these Flatteries. For certainly the greate happiness of any Governmt rests Principally in this, namely the Mutuall Confidence that the Governors have in the people as to point of Duty and obedience and that the Governed have in their Governors as to point of Protection, and to Secure this mutuall Confidence was that Ancient and Solemne Institution of Oath of Fidelity of the People to the Prince and of Preotection and upholding their first Liberties & Laws by the Prince to the People. And the first breach that happens in this Golden Knott as by miserable Experience we have learned, . . . when Insinuations of diffidence and distrust and Jealousies are Secretly Nourished or openly made, and most Certainly there is not any one more mischievous and Pernicious Root of Jealousies -39- and Diffidences then to tell ye world yt the Prince is bound to keepe none of the Lawes that he or his Ancestors have by the advice of his greate Councill Established that he may repeale them when he sees cause. That all his Subjects Properties depend upon his Pleasure. That there is noe Law Soe Strictly and prudently Penned for the Secureing of his Subjects Liberties and Properties, but they intrinsically have this Condicon implyed, tho' not Expressed. That when he Judgeth itt fitt he may Suspend or abrogate them. Such a Man that teacheth Such a doctrine as this as much weakens the Soveraigne Power as is imaginable and betrayes it wth a Kisse.

4. And as thus it is mischievous to the Governors So it is as mischievous to the Governed, when People are under this apprehension, but their Properties and Estates are no longer theirs then itt shall please their Governors. Itt destroyes Industry, and care to enrich themselves by trade or adventure and consequently impoverisheth the Kingdome . . . very Sloathfull -40- and Poore Spirited. For tho' it be a false and Invidious Collection and Consequence that because according to the Doctrine proposed a Prince may take

away his Subjects Laws, Liberties, Estate, therefore he will. Nay, tho' upon a just and true accot what ever the Power of the Prince be, yett itt is his Interest to use that Power to the benefitt and not to the Detrimt of his Subjects, To keepe them Rich and thereby make them obedient, rather then to impoverish and make them Desperate, Yett itt is most certaine that if once men be under that Jealousie that the Laws of the Landes doe not sufficiently fix their Properties and Liberties, Mans mindes will be Pendulous and unquiett and Subject to feares and Doubts, and thereupon Industrie and paines will wither and Decay, whatsoever Orations Men of Witt and Eloquence may otherwise make to Secure them.

5. The reasons that those Speculators use to inculcate their Pernitious Doctrine of this kind one [*sic*] very vaine and frivolous. And they are for the most part such as these.

-41- 1. The Reason and Intention of Governmt is Cōmon Safety, but such Occurrences may happen as upon Sudden Invasion or Rebellion, that if the Prince Should be bound to ye Letter of Laws not to raise Supplyes for an Army till a Parliamt could be Convened, the Kingdome might be overrun, and ye good Subjects loose the Benefitt of that Protection that is due to them for the Strict observation of a Punctilio of a lawe agst raiseing Taxes wthout Consent of Parliamt.

I answer 1st that as Lawes So the Method and Modelling of Governmts are to be fitted to what is the Cōmon and Ordinary State of thinges ad Plurimum, because mankind have most Ordinarily to doe wth Such Circumstances of affaires as most usually happen. And it is a Madness to thinke that the Modell of Lawes or Governmt is to be framed according to Such Circumstances as very rarely occurre. Tis as if a Man should make Agarike and Rhubarb his Ordinary Dyett, because it is of use when he is Sicke wch may be once in 7 yeares.[1]

-42- 2. Itt is not possible for any humane Constitution whatsoever to be so perfect as to answere exactly to every Circumstance of affaires. And therefore in the Estimate and Measure of the goodness or Convenience of Governmt we are to weigh wch answer most Exigences of humane life, and tho' it answer not all, yett it deserves a p'ference before any other that answers Some Occasions but not Soe many or Soe well as the former. Itt is better to be Governed by certaine Laws tho' they bring Some Inconvenience att Some time then under Arbitrary Governmt wch may bring many Inconveniences that the other doth not.

3. But this is but an imaginary feare as appeares by Experience. For this Kingdome hath been now these 500 yeares govern'd by Laws made by Parliamentary advise and noe time yett afford us an Instance wherein a Parliament might not be timely Enough called for such a Supply (unless in those miserable brogles [2] that happened between the King and Parliamt, wch never could have been, if the King had not Consented to a Bill -43- to make it perpetuall. And it is apparent by reason it must needes be so, unless we should imagine that Princes shou'd be so unprovided as not to foresee an imminent Warr above 6 Weekes before itt breakes out. We must not thinke Princes and their Councells, and Ministers, are So Supine and So destitute of Intelligence both at home and abroad as not to have a prospect of such

[1] Cp. Burke, Reflections on the French Revolution 93—"I confess to you, Sir, I never liked this continual talk of resistance and revolution, or the practice of making the extreme medicine of the constitution its daily bread. It renders the habit of society dangerously valetudinary: it is taking periodical doses of mercury sublimate and swallowing down repeated provocatives of cantharides to our love of liberty."

[2] Qu. "broyles."—F.P.



thinges or not to understand their own purposes and intentions in Matters of So greate Moment as Warr and Supply.

And therefore they write and Speake att randome that tell us the 2 most Eminent Kinges of this Realme Ed. 3 and Henry 5 tooke the greatest freedome in Impositions upon their Subjects. For he that is but little Conversant wth the Parliamt Rolls of the Historyes of those Kinges will finde that tho' they did greate thinges yett was their Warrs and Armies maintained by Parliamentary Supplyes, and those Kinges had the fewest of Arbitrary Impositions of any that preceded or Succeeded them etc. . . .

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